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R E P O R T S O F C A S E S

ADJUDGED IN THE

Court of King's Bench,

Since the Time of LORD MANSFIELD'S Coming to
preside in it.

By Sir JAMES BURROW.

With TABLES
OF THE NAMES OF THE CASES,
AND
OF THE MATTER CONTAINED IN THEM.

VOLUME THE FOURTH.

Beginning with *Michaelmas Term 7 G. 3. 1766,*

AND

Ending with *Hilary Term 10 G. 3. 1770, (inclusive.)*

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M D C C L X X X I V.



LIBRI NUOVI PER L'IMMAGINE
D'UNO O POCO MOLTO DI PIU' BELLI
COSTUMI
SOTTOPIANO A TUTTI I GIORNI
CON UNO SPETTACOLO DI UN'ORO
E D'UNA SQUADRONE

A D V E R T I S E M E N T.

NO SETTLEMENT Cases are reported in this Volume; nor is any Abridgment of them contained in the Table at the End of it.

The Reason of this Omission is, that I have already published them (in a separate Collection in Quarto) as far as the 4th of July, 1772: and hope to be able, before next Michaelmas Term, to publish a Supplemental Continuation of them quite up to that Term, in a very small Quarto Volume.

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Michaelmas

Michaelmas Term

7 Geo. 3. B. R. 1766.

[Sir John Eardly Wilmot having (on the 21st of August last) been appointed Lord Chief Justice of the Court of Common Pleas, in the Room of Lord Camden, to whom the Great Seal was delivered upon the Earl of Northington's resigning it; Mr. Serjeant Hewitt was Yesterday appointed a Judge of this Court; and took his Place upon the Bench this Morning.]

Thursday 6 Nov. 1766.

Rex *versus* Inhabitants of Castleton.

[This Case is already reported *at large*, in the Quarto-Edition of my SETTLEMENT CASES, No. 183. Page 569. and abridged, in the Table to it.]

Rex *versus* John Price, Esq.

Friday 7 Nov. 1766.

CAUSE was shewn why an Information should not go against the Defendant, a Berkshire Justice of Peace residing at Wantage, for a Misdemeanour in oppressively sending to Gaol some poor Inhabitants of the Parish of Chiltern, for FELONY in gleaning a Field of John Simmons a Farmer of that Parish; (which they insisted they had a Right by Law and by the Custom and Usage of that Parish, to do;) and for refusing to discharge them out of Custody, after they had found Bail.

The Field of Barley was partly cut; but not carried in, a third Part of it being on the Ground; nor indeed completely raked and cocked, when these Gleaners took it away. Oath was

was made by the Farmer, before the Justice, "that these People had *stolen* his Barley in the Straw :" And he now swore "that he had forbidden them; and yet they took it "by Handfuls : and that he had suffered the loss of about "twenty Bushels of Barley by their carrying it off, two "Days together."

Mr. Morton, who shewed *Cause* on Behalf of the Justice, denied the *Right* which these People claimed ; and said that the Justice was obliged to proceed against them as He had done ; a *Felony* having been sworn upon them, and they having no *Bail* then ready * : For their *Bail* refused to bail them till after the Justice should have first committed them. and asked them if they *bent* to the *House of Correction* ; And then He alone did bail them, taking only one single *Bail* ; and thereupon ordered them to be discharged ; though He did not immediately sign a *Warrant of Discharge*. He denied all *Malice*, and any *Design of Oppression*.

* The Justice heard the Complaint, them till after the Justice should have first committed them. and asked them if they *bent* to the *House of Correction* ; And then He alone did bail them, taking only one single *Bail* ; and thereupon ordered them to be discharged ; though He did not immediately sign a *Warrant of Discharge*. He denied all *Malice*, and any *Design of Oppression*.

be first committed; and then he would be bail for them. There were seven of them, Men and Women. They were encouraged by a neighbouring Attorney.

Sir Fletcher Norton, contra, insisted on the *Right* of the Poor, to glean, after the Corn is carried off the Land : And he said that they would be justified, in an Action of *Trespass*, for entering such Land in order to glean, under the Common-Law Right of so doing.

The Fact could not, He said, be a *Felony* : At the utmost, it could be but a *Trespass*. But it really was neither : For, by Law, they had a strict *Right* to do it. However, if it were a *Felony*, the Justice had no *Right* to commit them to the *House of Correction* ; nor had He alone any Power to bail them †. It is plain that he knew it was not a *Felony*.

+ V. 1 & 2.
Ph. & Ma-

ry, c. 13.

§ 3.

Lord Mansfield—*STEALING*, under the *Colour* of *leaving* or *gleaning*, is not to be justified.

Now the Charge against these People is *Stealing* the Barley, before the Crop was carried off ; and when Part of it was not cut, and a third Part left on the Ground, not yet carried in. There does not appear to be any Sort of Contest between the Farmer and the Poor about *Leaving* : His only Objection, and his Forbidding, is confined to the *Stealing* of it.

No *Malice* or *Oppression* at all appears in the Conduct of this Justice : The Mistake seems to lie on the other Side. The *Malice* seems to be in the Attorney, who carries on the Prosecution against Him.

Therefore

Therefore the Rule ought to be discharged with Costs.

Mr. Justice *Yates* said, He could not see that the Justice had acted with any Criminality or bad Intention; but rather with Lenity: and in such a Case, the Magistrate ought to be protected, not punished.

As to the *Right* of Leasing—It will be Time enough to determine that Point, when it comes directly in Question.

But here, the Farmer had not abandoned his Corn, or carried it off: And He has sworn that they *stole* it.

Mr. Justice *Aston*—He has acted with Moderation and Lenity. The Rule ought to be discharged with Costs.

The Right of Leasing is no Part of the present Question: It may be exercised by Law or Custom, in a certain Degree: But that Question may depend upon Circumstances. This is no Question about the Right of Leasing or Gleaning: It is a Charge of *Stealing* the Corn; and Oath is made of their having *stolen* it.

Mr. Justice *Herrett*—The Right of Leasing does appear in our Books: But it must be under proper Circumstances and Restrictions. However, it is no Part of the Question here: For this is a Charge of *direct stealing*.

The Justice appears to have acted in this Case without any Design of Oppression, or Malice, or any bad intention: On the contrary, he has behaved with Lenity and Tenderness. It would be very wrong to punish a Justice of Peace by the extraordinary Method of a Information, when He has acted fairly, honestly, and impartially.

Therefore this Rule ought to be discharged with Costs.

Per Cur'. unanimously—

Rule discharged with Costs.

Bennet, Administrator, *versus* Coker.

Saturday 3
Nov. 1766.

MR. Dunning moved, on behalf of the Plaintiff, an Administrator, for Leave to discontinue, without Payment of Costs.

This

This was an Action upon a Bond against an Heir. On the Plaintiff's not trying it according to Notice, the Defendant moved for Judgment, as in Case of a Nonsuit: Whereupon, the Plaintiff undertook to try it peremptorily. When it came down to Trial, He first discovered "that "the Estate had been *conveyed*;" and was then satisfied "that there was a *Deed of Conveyance*, which would be "produced at the Trial." Whereupon He declined to go to Trial; and now desired to discontinue.

* V. ante,
p. 1584 and
1586.

Mr. Thurlow, on Behalf of the Defendant, opposed his doing so, without paying *Costs*. He mentioned the Case of *Hawes, Executrix, versus Saunders, M. 5 G. 3**. where it was determined "that an Executor shall pay Costs for not "going on to Trial, after having given Notice of Trial :" And he argued, that so He shall likewise, where He has not tried it pursuant to his *Undertaking*, after a Motion has been made against Him for Judgment as in Case of a Nonsuit. For this was his own Laches: He ought to have been previously informed of the Facts upon which he grounded his Action.

Lord Mansfield—This may be reasonable in a Case where the Executor may probably bring another Action. But here, I suppose, He will be bound *not* to bring another Action?

Mr. Dunning readily agreed to be so bound.

And THE COURT observed, that on a *Judgment as in Case of a Nonsuit*, an Executor does *not* pay Costs.

Mr. Thurlow urged, that here, the Executor has *positively undertaken* to try it; and thereby put the Defendant to the Expence of going down to Trial. And they may go on again: they will not be absolutely precluded.

Lord Mansfield—Here is no double Vexation. The Plaintiff agrees not to try it; but withdraws the Cause at the Assizes, upon finding that there is a Deed against him. So that there is an End of the Matter.

Mr. Justice Aiston observed to Mr. Thurlow, that the Defendant had saved all the Fees of the Court; which he must have paid, if there had been a Verdict. (Which Observation was repeated and confirmed by Lord Mansfield.)

Mr. Justice Yates—It is not in *all* Cases, that an Executor shall discontinue *without* paying Costs: For, if it is plainly his

his own Fault, he shall not have such Leave. So, in Case of not going on to Trial, if it is in his own Laches, He shall pay Costs. (To which also Lord Mansfield agreed.) Therefore the Question is, "whether there is *Laches* or *Delay*; or "whether it be a *fair Transaction*?" Now this was fair and candid. The Plaintiff has done better for the Defendant, than if he had gone on to Trial: He discovered he was in the wrong; and as soon as he knew it, desisted.

THE COURT granted Mr. Dunning's Motion, "to discontinue without Payment of Costs:" But the Plaintiff was not to bring any new Action, without *Leave of the Court. [* There might perhaps arise Assets *in futuro*: And then it would be reasonable for the Executor to have Leave to bring a new Action.]

Brown, qui tam, *versus* Bailey.

Wednesday, 12 Nov. 1766.

THE COURT made a Rule, "That where they give * V. 18
*Leave to compound a Penal Action, the King's Half Eliz. c. 5. s.
of the Composition, shall be paid into the Hands of the 3 & 4 made
Master of the Crown Office, for the Use of his Majesty".
perpetualby
27 Eliz. c.
10.

Gulliver, on the Demise of Ambrose Corrie,
Clerk; and also on two several Demises of
the same Person by the Name of Ambrose
Wykes, Clerk; *against* Shuckburgh Ashby,
Esq; and others.

THIS was a special Case in Ejectment. The Cause came on to be tried at the last Lent Assizes for the County of Northampton, before Mr. Justice Yates; when it was agreed, by Consent of the Parties, that although a Verdict was found for the Plaintiff, on the last Demise, it should be subject to the Opinion of this Court upon the following Case.

William Wykes, Esq. being seised in Fee of the Estate in Question, (subject only to a Mortgage of Part thereof,) on the 15th of August 1736, made his last Will in Writing duly executed and attested; whereby he devised (amongst other Things,) in Case he should die without Issue, that, after the Death of his Wife, the Premises should go to his Sister Dorcas Wykes, for Life; and after her Decease, unto his Nephew Andrew Saunders, and the Heirs Male of his Body lawfully begotten, and the Heirs Male of their Bodies lawfully begotten; and for Want of such Issue, unto the Heirs Male of the Body of his Sister Dorcas Wykes, and the

Heirs Male of their Body lawfully begotten ; with Remainder, to his Wife and Nephew's Godson *Ambrose Corrie* (the Lessor of the Plaintiff) and the Heirs Male of his Body lawfully begotten, and the Heirs Male of their Bodies lawfully begotten ; Remainder, to the Heirs of the Body of his Nephew *Ambrose Saunders* ; Remainder, to the Heirs of the Body of his Sister *Dorcas Wykes* ; Remainder, to his Kinsman *Robert Ekins*, and the Heirs Male of his Body in Tail Male ; Remainder, to his own right Heirs for ever :
 " PROVIDED always, and this Devise is expressly upon this
 " Condition, that whenever it shall happen that the said
 " Mansion-House and said Estates, after my Wife's De-
 " cease, shall descend or come unto any of the Persons
 " herein before named, [that] the Person or Persons to
 " whom the same from Time to Time shall descend or come,
 " [that He or They] do or shall then change their Surname,
 " and take upon them and their Heirs the Surname of WYKES
 " only, and not otherwise." But, in this Proviso, there is
 no Devise over.

Yet there is another Proviso (which immediately follows) prohibiting *Waste*, without the Consent of the Person to whom the Premisses shall next come ; and in this latter Proviso, there is a Devise over to the Person who is or shall be next intitled to the Premisses expectant upon the Death of the Waster, of such Part of the Estate upon which Waste shall be committed or suffered : And so, *toties quoties*, on every committing or suffering Waste by the Person in Possession, without such Consent as aforesaid.

On the 9th of May 1742, the Testator died without Issue ; leaving his Sister *Dorcas Wykes*, Spinster, and *Ambrose Saunders*, (the only Son of *Sarah Saunders*, his other Sister, then deceased,) his Co-Heirs : And his Widow entered upon the Estate, and enjoyed it till her Death. And upon her Death, which happened on the 16th of January 1747, his Sister *Dorcas* entered, and enjoyed till 26th of December 1756 ; when she died without Issue ; and *Ambrose Saunders*, who was then the Testator's sole Heir at Law, entered, and enjoyed till 8th of October 1765 ; when he died, without Issue ; and the Defendant *Shuckburgh Abby* entered, and has (together with the other Defendants, his Tenants,) been in Possession ever since.

On the 8th and 9th of February 1759, the said *Ambrose Saunders*, being in possession, executed Indentures of Lease and Release, and became Vouchee in a Common Recovery, which was suffered in the Easter Term following ; But NEVER CHANGED HIS NAME of *Saunders*, nor took upon him the Surname of *Wykes*.

On

On the 17th of January 1766, the Lessor of the Plaintiff entered, for *Breach of the Proviso*, by *Ambrose Saunders's* not taking the Name of *Wykes*.

It appeared upon the Trial, that *Ambrose Saunders*, by Indenture dated 26th October 1757, had mortgaged Part of the Premisses in Question.

The Question was, "Whether, on the Case above stated, the Plaintiff was intitled to recover, in this Ejectment, such Parts of the Premisses mentioned in the Declaration as are not comprised in the said Indenture of 26th of October 1757, or any Part thereof?"

This Case was argued twice: first, by Serjeant *Glynn* for the Plaintiff, and Serjeant *Leigh* for the Defendants; and the second Time, by Mr. *Hill* for the Plaintiff, and Mr. *Blackstone* for the Defendant.

Serjeant *Glynn* and Mr. *Hill* argued that the Plaintiff has a Title to recover; both upon the general Rules of Construction, and legal Authorities; and to effectuate the Intent of the Testator.

They endeavoured to shew, that the 'Proviso' "to take 'the Surname'" operated as a *conditional Limitation*, NOT as a *Condition*: And therefore the Lessor of the Plaintiff's Title accrued before the common Recovery was suffered.

They previously discussed the legal Notion of a *Condition*, and of a *Limitation*; and cited *Co. Litt. 201. a. b. 214. b. 215. a. b.* and said that Conditional Limitations differ from Conditions subsequent; and have different Properties. 2 *Salk. 570. Page versus Hayward. 1. Vent. 202. The Lady Anne Frye's Case.*

Whenever the Estate determines by Way of Limitation, (though a collateral or conditional Limitation,) it will go over to the next Person appointed to take, without any Devise over: But if the Condition or Limitation is annexed to an Estate of Fee-simple, then it will go to the Heir (either general or special; unless there be a Limitation over.

Wherever several Estates are devised one after another, if any of the preceding Estates become void, the next Remainder-man shall take, though there be no express Devise over.

A Remainder *vested* cannot be *devested* by the Determination of the preceding Estate: And consequently, it must take Effect immediately. 2 *Co. 51. a. Sir Hugh Cholmley's Case.*

Case. 2 Bulstr. 425. Roberts versus Roberts. 3 Lev. 437.
Duncomb versus Duncomb. Perk. § 567. Bro. Devise 4.

There is no Distinction between Remainders depending on Estates Tail, and Remainders upon Estates for Life. Where the Devisee in Tail dies or refuses, the next in Remainder shall take. In Proof of which, they cited *Cro. Eliz.* 423, and the Case of *Goodright versus Wright*, 1 Strange 25. and that of *Goodright versus Cornish*, in 4 Mod. 255. and 1 Lord Raym. 3. and 1 Salk. 226 S C. where the Court held, "that if the Remainder to the Heirs Male of *John Knowling* was void in Point of Limitation, then the next Remainder limited to *Richard* took Effect presently."

And there is no Difference in Point of Reason, where the Estate Tail is *originally void*, and where it determines by Matter *ex post facto*.

An Authority precisely to the Point is *Rudball versus Milward*, Moore 212. M. 27 & 28 Eliz. (at which Time a Condition to restrain a Discontinuance was, and perhaps is now holden to be good; though a Condition to restrain a Common Recovery is not so.) It was determined, "that *William Rudball* was enabled to take Benefit of the Breach, whether it was a Condition or Limitation." And Lord Chief Justice *Hobart* says, in the Case of *Sheffield versus Ratcliffe* (Page 346) "that by the Cessor of an Estate-Tail, it accrues to him in Reversion."

So that wherever the precedent Estate-Tail becomes absolutely void before a Discontinuance, the Estate shall not totally fail; but the next vested Remainder shall take Effect. And Estates Tail are only barrable by Common Recovery; or discontinuable by Fine or Feoffment.

They argued secondly — That here *Saunders's* Estate became void; and the Plaintiff's Remainder was let in. This, they said, was the INTENTION of the Testator; which is to be supported, if it can be so by the Rules of Law. And they observed, that a Testator is not confined to technical Terms.

This Proviso operated as a Limitation to the Devise to *Saunders*.

The three first Devises (after that to his Wife) are in Tail-Male: Provided "that the Person or Persons to whom the Estate shall come, [He or They] shall change their Surname, and take and use the Surname of *Wykes* only, and not otherwise."

THIS

THIS Proviso operated as a Limitation to the Devise to Saunders; and extends to all the Devisees.

The whole Will is to be considered as one *Add*: It was equally the Testator's Object, "that Saunders should take his Name, as that He should take his Estate." The former was indeed the Testator's primary Intent: And He meant this as a *Limitation*. And the Devisee ought not to retain the Estate, unless He performs the Condition, or *conditional Limitation*; which were the same Thing in the Idea of the Testator: For he could not mean it as a *Condition*, in the strict legal Sense of that Word; because Saunders was his Heir at Law. And they cited *Cro. Eliz. 204. Wellock versus Hamond*, and *Cro. Jac. 56. Curteis versus Wolverston*, to prove this to be a Limitation. The former of these two Cases, namely, that of *Wellock versus Hamond*, is also in 2 *Leon. 114.* and 3 *Co. 20. b.* (cited in *Boreaston's Case*: But Mr. Hill cited it from *Cro. Eliz. 204*). The Word "paying" was construed a Limitation, and not a Condition: "And, being a Limitation, the Law shall construe it, that upon Non payment his Estate shall cease; and then the Law shall carry it to the Heir by the Custom, without any Limitation over." He observed that the Case in *Dyer 317.* mentioned in 3 *Co. 21. a.* should be 316. b. pl. 5. (As it certainly should.)

A Condition can only go to the Heir at Law. But the Customary Heir came in there, as upon a Limitation.

So here, the Remainder Man shall come in, upon the Breach of this Conditional Limitation; as the Proviso must operate by Way of *Limitation*. The Heir at Law can't take, till all the Limitations are spent. This is a Devise over, by *Implication* at least, if not in express Terms. But

Thirdly—if it be still objected, "that the Testator has not devised over in express Terms, upon Breach of this Condition."

They answered, that it was not necessary for him to keep to exact and technical Terms; even if He had, in this Case of not taking his Name, the same Intention of the Estate's going over, as He has expressly directed in the Case of Waste: And in that Case, He has only given over the mere Place wasted; not the whole Estate.

As to any Objection that may be raised from no particular Time being fixed upon, at which the Condition may be said to be broken—The Answer is, that "it was broken before the Common Recovery was suffered." The Common

mon Recovery came too late. *Page versus Hayward*, 2 *Salk.* 570. and *Pigott on Common Recoveries*, 175. *Benson versus Hodson*, 1 *Mod.* 111. The same Objection might have been made, if the Estate had been expressly devised over, in Case of a Breach of this Conditional Limitation.

It is sufficient, that we shew a Non-performance of the Condition, at the Time of *Ambrose Saunders's coming to the Estate*; and that he lived near nine Years, and yet never changed his Name, nor took the Name of *Wykes*. They shew no Performance at any Time: which should come on their Side, if there was any Pretence of a Performance at all.

Therefore they prayed Judgment for all the Premises, except that Part that was in Mortgage.

Serjeant *Leigh* and Mr. *Blackstone* argued on Behalf of the Defendant; and principally insisted on the Intention of the Testator: which does by no Means support or consist with their Notion of a Conditional Limitation; or *Implication* of a Devise over, in order to effectuate the Testator's Intention.

This Devise can only be considered either as a Condition precedent, or a Condition subsequent.

In fact, it is only a Condition *subsequent*. And a Condition subsequent cannot be taken Advantage of by a Stranger, (as the Lessor of the Plaintiff here is) but only by the *Heir at Law*. And it is barrable by a Common Recovery, according to the Opinion of *Hale*, in 1 *Mod.* 110, 111. *Benson versus Hodson*.

Where a Testator devises over, it cannot go to the Heir at Law. 1 *Vent.* 199. 203. *Carter versus Lady Ann Frye*. *Carter* 171, *Rundale versus Eeley and Others*: And there are some other Cases of Conditional Limitations; and where the Condition would become extinct by the Descent to the Heir upon Breach; as in the Case of *Wellock versus Hamond*. But the present Case does not fall within that of *Wellock versus Hamond*. That was holden to be a *Limitation*: This is a *Condition*.

In this Proviso, there is no Devise over. In the next, there is: Namely, in Case of Waite; in which Case, the Person is to forfeit to the next Taker. But the Waster is to forfeit only the *Locus vagatus*. And the second Proviso is very properly worded.

Therefore, 1st. The Testator knew how to limit over, when he judged proper to do so: And 2dly, He did not intend

tend or suppose that the *whole* Estate should go over, *without* a Devise over; because, in the Case of Waste, He gives only the *Locus wastatus*.

And no Argument can arise from *Ambrose Saunders's* being Heir at Law to the Testator; because, in Fact, *Ambrose Saunders* was not *sole* Heir at Law at the Testator's Death: *Dorcus Wykes* was then Co-Heir with Him. And if it is a conditional Limitation now, it must have been so at the Time of the Testator's Death. But it was not so then; nor can it be made so now, by a subsequent Event.

The Testator meant, that the Estate should pass entire. He did not intend that the Estate-Tail should be defeated by the Fault of the first Taker. The Case of *Jermyn and Arscot*, in 4 *Leon.* 83. 1 *Anderson* 186. 2 *Anderson* 7. *Moore* 364. and 1 *Rep.* 85. (in *Corbet's Case*) proves "that "the Estate-Tail cannot be defeated in *Part*, and remain "in *Part*."

The Law will not raise such an Implication as this, upon an Estate-Tail. *Wellock versus Hamond* (which is the only Case of an Heir by Custom taking Advantage of the Breach) was a Fee; and was a Devise of the *whole* Fee. And *Cro. Eliz.* 205. is express, "that, being a Limitation, the Law shall construe it, that upon the Non payment of the Money, his Estate shall cease; and then the Law shall carry it to the Heir by Custom, without any Limitation over." In the Case of *Skirne and Dame Bond*, in 1 *Ro. Abr.* 412. Title Condition, pl. 6. It was resolved "that if a Man devises Land to Another in Tail, upon Condition that he shall not alien; and that if he dies without Issue, it shall remain over to Another in Fee; and after, the Devisee aliens; yet he in Remainder cannot enter for the Condition broken; but the Heir at Common Law: For this is no Limitation, but a Condition."

Though it might have been construed a Limitation, if it had been annexed to an Estate in Fee; yet when it is annexed to an Estate-Tail, it shall be construed a Condition, for the sake of the Issue. *Dorothy Wykes* might have left Issue; And they ought not to have been deprived of their Moiety.

The Case of *Rudball versus Milward*, in *Moore* 212. is a confused Note: Nothing can be collected from that Report, "whether it was a Condition, or a Limitation." But *Savile* 76. S.C. explains it, and shews clearly, "that it was a Condition, and not a Limitation."

Thomas's Case, in 1 *Ro. Abr.* 411. Title "Condition or Limitation," pl. 1. and 843. Letter L. pl. is in point: And

And that was determined five Years subsequent to the Case of *Wellok versus Hamond*. It was a Devise to his Daughter in *Tail*, with divers Remainders over: *Provided* "that the Daughter and every One in Remainder should permit and suffer T. (who then occupied the Land) to enjoy it during his Life." This is not a Limitation; though the Daughter was Heir General, and so was Herself to have the Advantage of the Condition, if it be a Condition: Notwithstanding which, it was holden to be a Condition.

And these two Cases are reconcileable, only by the Distinction between being in *Fee*, and in *Tail*.

Therefore they concluded that no Limitation shall be raised in the present Case, by *Implication*.

But even supposing that it might be construed as a Conditional Limitation—Yet, 1st. There is no *Breach*. 2dly. If there was, the Lessor of the Plaintiff could not take Advantage of it.

First—The Person required to change his Name had his whole *Life-Time* to take the Surname of *Wykes*. And as an Authority for this Assertion, they cited *Foehie's Case*, in 6 Rep. 30, 31. And in 4 Leon. 305. Case 425. it was agreed by all the Judges, "that Conditions which go in Defeasance of an Estate are odious in Law; and no Re-entry shall in such Case be given, unless the Demand be precisely and strictly followed."

The Words "not otherwise" in this Proviso only mean "No other Name."

The taking the Name of *Wykes* was of no Benefit to any Body: And the Devisees are not fixed to a particular Time. Therefore the Condition is not broken, if the Possessor of the Estate takes the Name at any Time during Life.

Ambrose Saunders was Heir at Law for Half. The Court will not presume him conusant of the Will and Proviso. However, it certainly was not necessary for him to do it instantly: He must, at least, have convenient Time. And convenient Time is during the whole *Life* of the Taker; it being left indefinite; and no Benefit accruing to any Body by his taking the Name.

Consequently, *Ambrose Saunders* had a good Estate-Tail in Him, at the Time when he suffered the Common Recovery; and thereby acquired a Fee. 1 Mod. 111. *Benson versus Hodson*, 1 Salk. 570. the fourth Adjudication in *Page versus Hayward*. In

In that Case of *Page versus Hayward*, 2 *Salk.* 570. reported also by Mr. *Pigott* in his *Treatise of Common Recoveries*, page 175, the Condition was—"to marry a *Searle*;" and *Mary Bryant* had actually married another Man: Yet, still, there was a possibility of her performing the Condition. But it was resolved, that if it had been—"Provided and upon Condition if She marry any but a *Searle*, it shall then remain and be to J. S. and his Heirs;" a Common Recovery suffered before Marriage would bar the Estate-Tail and Remainders: And though She after marry with Another, it shall not avoid the Recovery.

Secondly—But even admitting that it was a Conditional Limitation, and that *Ambrose Saunders* ought to have taken the Name presently; yet the Lessor of the *Plaintiff* can have no Right to recover. For, upon a Limitation, the Estate ceases, without Entry or Claim: And the Law casts it upon the Party to whom it is limited. To prove which, they cited *Moore* 633. *Anthony Mildway versus Humphrey Mildmay*. *Carter* 171. *Sir William Jones* 58. *Walter Foy versus William Hynde*. *Co. Litt.* 214. b. 10. *Rep.* 40. and 2 *Mod.* 7.

Therefore, upon their own Principles, *Corrie* ought immediately to have taken the Name of *Wykes*: And so on. So that at the last, by a Circuitry, it would come round again to *Ambrose Saunders*, the Heir at Law.

But *Ambrose Corrie* did not enter and take the Name. So that He is under this Dilemma; that either the Estate of *Ambrose Saunders* did not cease upon *Saunders's* not immediately taking the Name of *Wykes*; or (if it did) then his own Estate must have ceased, upon his not having immediately taken the Name of *Wykes*; and the Person next in Remainder must take. So that, either Way, he could have no Title.

Even at the Time of his bringing the Ejectment, He had not taken the Name of *Wykes*, and only *Wykes*. For, One of the Demises is by the Name of *Ambrose Corrie*; though the other two call Him *Ambrose Wykes*. So that He did not take the Name of *Wykes only*. Now the Estate and the Condition must vest together. If He was in by Relation, He ought also by Relation to have taken the Name of *Wykes only*.

Therefore *quacunque via datâ*, he has no Title to recover, in this Ejectment.

In Reply—The Counsel for the Plaintiff endeavoured to support their former Grounds of the Lessor's Title, and to answer the Objections that had been made to it.

Their Argument consisted of two Parts ; 1st. That the Proviso ought to be construed as a *Limitation* ; 2dly. That an *implied Devise* to the Plaintiff appears upon the Face of the Will.

They argued, that this Proviso ought not to be construed as a Condition subsequent, but as a *conditional Limitation* ; both according to the Rules of Law, and according to the Intention of the Testator : And consequently, the Heir at Law shall not take, on Breach of it ; especially, as He was here the very Person who broke it.

As to the Case of *Porter versus Frye*, (Lady *Ann Frye's* Case) 1 *Vent.* 202. that, they said, was a Restraint on Marriage : And whenever the Condition is in Restraint of Marriage, it will fail, unless there be a Devise over *; as in the Case of *Hervey versus Aston*.

**Lord Mansfield* said,

that was

a Condition precedent ; and therefore the Estate never vested. And in Chancery it is held, "that subsequent Conditions of Forfeiture in Restraint of Marriage are only meant in *terrorem*; unless there is a Devise over."

Where the Heir at Law is the only Person that can take a Benefit by the Breach, it is a Conditional Limitation : Because it would be nugatory "to construe it a Condition." And here *Ambrose Saunders* was *sole Heir* at the *Time of the Recovery suffered* : Therefore, it would be *nugatory*, if construed as a Condition.

The Testator meant the Estate and the Name to go *all* together ; not in Moieties of the Estate. And it was certain that *A. S.* would become sole Heir, whenever *Dorcas* should die without Issue. Besides, *Dorcas Wykes* and *Ambrose Saunders* were but *One Heir* : And it was an *entire Descent* to Both. And it must have been an † *entire Entry* for the Breach ; and not in Moieties. *Eastcourt versus Weekes*, 1 *Lut.* 802. One Co-parcener cannot enter for Self, and the other Co-parcener. No Entry can be for a Moiety : They are but *One Heir*.

There is a Difference between Parceners by *Custom*, and Parceners by *Common Law*. The Latter are considered as *One Representative* of the Deceased : The Former, as *Several* ; Each as to his respective Part.

As to Provisoes tending to restrain Alienation by Tenant in Tail---They said, that an Attempt to introduce Perpetuities

ties shall never prevail. They agreed, that a Limitation cannot make *Part* of the Estate cease, and not the Rest : And consequently, they admitted, that if this Estate ceased as to *Ambrose Saunders*, it also ceased as to his Issue. But they argued, that it is no hardship upon the Issue of *Ambrose Saunders*. In support of which they cited what was said by Lord Parker, in the Case of *Goodright versus Wright*, in 1 *Stra. 32.* in Answer to the Supposition of Hardship upon the Issue; who were not in being at the Time of that Devise. And in the Case at Bar, *Ambrose Saunders* had no Issue at the Time of the Devise. Therefore the Issue of *Ambrose Saunders* could not be the Primary Object of the Testator's Regard; and the Remainder-Men only secondary Objects of it. They insisted, that this Breach of the Conditional Limitation makes a total Failure of inheritable Issue : And therefore is the same as if there was none at all.

As to *Ambrose Saunders*'s having Time during his Whole Life, to take the Name of *Wykes*—Here is a Time expressly limited : “ Whenever the Estate should come to the Taker,” he was then to take the Name of *Wykes*.

But if it had not been particularly limited, yet it ought to have been done as soon as it could conveniently be done. Whereas this Recovery was above two Years after the Estate came to Him : And He never took the Name : not even upon the Recovery itself. Therefore He forfeited, on not doing it immediately, or at least as soon as conveniently might be.

As to Hale's Opinion, in 1 *Mod. 111.* and the Case of *Page versus Hayward*—They go upon the supposition “ that the Condition was not at that time broken.” But here it was broken, at the Time when the Recovery was suffered.

As to the Lessor of the Plaintiff not taking the Name immediately, Himself—He was not to take it till he came into Possession. He has never entered. He was not to take the Name without the Estate. He took it as soon as He claimed the Estate.

As to the Proviso against Waste being explicit in giving over the Place wasted—Though that second Proviso is indeed more explicit than the former, yet the Proviso now in Question contains a very strong Implication : And all the Words of this Will cannot be satisfied, unless this Implication be made. Therefore such an Implication shall be made upon this first Proviso.

LORD MANSFIELD, after stating the Case, observed that the only Foundation of the Plaintiff's Title is, “ that the Estate

"Estate-Tail was to cease upon Ambrose Saunders's not taking the Surname of Wykes; and that, for Want of his taking such Surname, it went over to the next in Remainder."

The whole of this Case is a Question of *Construction*; provided the Intention of the Testator be not contrary to Law.

With a View to effectuate the Intent of the Testator, it is certain that a Condition *may* be construed into a Limitation. And there is Nothing plainer than the Principles upon which the Case of *Wellok versus Hamond* was determined; "that it must be understood in the Nature of a Limitation, when the Estate to which the Condition stands annexed is given to the *Heir at Law*: Because, in Case it were a *Condition*, it would descend upon the *Heir Himself*, and extinguish in Him; and there would be no Remedy for the Breach of it."

But then that Case goes on, and determines directly contrary to the Intent, "that the Law shall carry it to the *Heir by the Custom*, without any Limitation over."

In that Case, the Money was to be paid by the Eldest Son to his Brothers and Sister, within two Years after the Death of the Testator's Wife. He did not pay it within two Years: But he paid it within five Years.

And at a Distance of Time, the Court determined, "that the *Heir by the Custom* should take Advantage of the Breach†." That certainly, was contrary to the Intention of the Testator: For He only intended "that the *Heir at Law* should have it as a *Pledge*."

In the present Case, his Lordship held—

Firſt—That this is not a Condition *precedent*. It can't be complied with, instantly. It is "to take the Name for themselves and their *Heirs*." Now many Acts are to be done, in order to oblige the Heirs to take it: such as a Grant from the King: or, an Act of Parliament. It is not, therefore, a Condition *precedent*; but being penned as a Condition, it must be a Condition *subsequent*. It can't be a *Limitation*: For, the next Proviso (against Waste) shews that the Testator knew how to limit over, when he thought proper to do so. And in *that* Case, he did think it proper to do it: And therefore *that* Proviso is turned into a Limitation.

As to any *Implication* of a Limitation upon the first Proviso—The Court can not intend or imply what does not appear to be the Testator's Intention. And no such Intention of the Testator

Testator appears in this Case : Rather the Contrary. And yet it is said, " that the *Estate Tail* shall cease ; and it shall go over to the next Taker, by Implication. But there is no Case or Authority produced in Support of such Implication. The Case of *Skyrne versus Bond*, and *Thomas's* Case, are, both of them, contrary to it.

A Condition annexed to an *Estate Tail* can never be meant to be compulsory : Because the Testator must know, that the Tenant in Tail could bar it the very next Term. Therefore this Condition could not be intended by the Testator to be compulsory, so as to bar the Estate Tail which he had given to *Ambrose Saunders*.

On *this* Will, it is clear that the Testator did *not* mean the *Estate Tail* to cease : For, the Condition is imposed personally upon *every* Heir—" *The Person or Persons* to " whom the Estate shall from Time to Time descend or " come." Therefore the Testator meant to pass over *only* the particular *Person* breaking the Condition, and to impose the Forfeiture upon him or them *personally* ; but *never* meant that the *whole Estate-Tail* should cease.

Now it is a Limitation void in Law, " that an Estate-Tail shall cease in *Part*, and not in the *Whole*." The Case of *Jermyn and Arscott* † is in Point. It would be a ^{V. ante} ~~v. 1935.~~ Limitation void therefore in itself, even if it could be implied.

It is not necessary to inquire whether the *Heir at Law* can take Advantage of this Condition or not : It is enough, that the *present Plaintiff* can not claim. It is plain to me, that He can not : And I am clear that the Testator had no such Meaning as has been suggested and supposed on the Part of the Plaintiff.

As to the Question, " Whether the Condition was broken, or not?"—In such a Case (of so silly a Condition as this is,) the Court would perhaps incline against the Rigour of the Forfeiture. But as to *this*, I give *no Opinion* ; nor upon Mr. *Blackstone's* ingenious Conceit of the Plaintiff's not having taken the Name, and therefore having *Himself* forfeited. The Plaintiff, who insists so strictly upon this being a Forfeiture of the Estate, has certainly no Pretence to any *Favour* from the Court. However, in this Case, there is no need to meddle with the Question about the Forfeiture : For the Recovery was *well* suffered ; and therefore the Plaintiff has no Title.

Mr.

Mr. Justice Yates—This is certainly not a Condition precedent.

The Question then is, “Whether it be a *conditional Limitation*? I am clearly of Opinion, It is *not*. Doubtless, ‘tis not an *Express* Limitation : And an *Implication* of One can only be made, in order to *effectuate* the Testator’s Intention ; and must be a *necessary* Implication to that Purpose.

Now this would *not* be so. Exclusive of this Recovery, All the Devises would take effect according to the Testator’s Intention, *without* such an Implication. And the Court will not make an Implication, to support an *idle* Intention, beneficial to No-body : Nor shall such an Implication be made upon a Limitation after *Estate-Tail*.

* V. ante 1932. Mr. Hill cited the Case of * *Rudball versus Milward*, (in *Savile* 76 and *Moore* 212. But that Case does not come up to a Limitation after an *Estate-Tail*.†

† Note, Lord Mans-

field had observed, at the End of Mr. Hill’s Argument, “that Rudball v. Milward “ was a hard Determination ; that there was no implied Limitation ; and that the “ Remainder was to the Heir at Law, who was to take the Advantage of the “ Breach of the Condition.”

If this was to be construed a *conditional Limitation*, it would strip the *Issue* of *Ambrose Saunders* ; and consequently defeat the Intention of the Testator : He never meant to exclude them. And yet it is urged, “ that they should be “ excluded.‡

‡ V. ante 1939.

It cannot, therefore, be considered as a *conditional Limitation*. Nor is it a *Condition* subsequent : For it would be nugatory ; as *Ambrose Saunders* might immediately suffer a Common Recovery, and bar the Estate. It can only operate as a *Recommendation or Desire*. And this is the stronger, by Reason of the *express* Condition annexed to the second Proviso ; (notwithstanding that it is an ineffectual One.)

Mr. Justice Aiston—Whether this be a Condition, or a Recommendation ; yet the Rules of making Implications do not hold in the Case now before Us. The Cases cited in Support of making the Implication are founded upon Reasons which do not exist in the present Case.

I take it to be a Condition subsequent ; and, as such, barred by the Common Recovery.

The Case of *Rudball versus Milward* is best reported in *Savile* 76. That was considered as a Condition ; and not a Limitation.

Limitation. And that is agreeable to *Thomas's Case* in 1
Ro. Abr. 411.

The Implication contended for, in the present Case, is contrary to the manifest Intention of the Testator: who never meant that the *Estate-Tail* should cease on a Breach of the Condition mentioned in the first Proviso. He certainly meant that the Issue in Tail should take, in Case of a Breach, upon the second Proviso. For the "Person to consent to the Waste," was the *Issue in Tail*: It was not meant to exclude Him. He agreed to the Observation, "that the Case of *Jermyn versus Arscot* seems to make this Condition void*." He inclined to think that *Ambrose v. ante Saunders* had his whole Life for taking the Name. He 1935, 1941. concurred in Opinion, with Lord *Mansfield* and Mr. Justice *Yates*, "that the Lessor of the Plaintiff had no Title."

Mr. Justice *Hewitt*—If this be considered as a Condition, it is collateral and subsequent, and would be destroyed by the Recovery.

Such a Proviso as this is, shall operate as a Limitation, where there is a Devise over; and also in some Cases where the Devise is to the Heir. The latter is an implied conditional Limitation: And this Case must be of that Sort, if it were a Limitation at all.

But here the Intention of the Testator appears to be contrary to such Implication. Such an Implication would defeat the Issue: Whereas He intended that they should be the next Takers, in Case of a Breach; not, that they should suffer by it.

However, there is no Authority that such an Implication of a Devise over can be made, after a Devise in *Tail*.

Welloock versus Hamond was a Devise of a Fee. And if it had been construed a Condition, it must have descended to the eldest Son upon his own Breach of it.

Rudball's Case seems rather to have been considered as a Condition, than as a Limitation. However, 'tis no Authority in the present Case.

In the Case of *Jermyn versus Arscot*, the Proviso was repugnant: It could not take Effect by Law. The Estate was "to cease, as if the Tenant in Tail Male was naturally dead. But the mere Death of such a Person does not determine his Estate. It must be a dying without Issue Malef." So, here, a like Repugnancy would follow upon a like Construction.

As

As to its being only a *Recommendation* - I find no Case in the Books, about *Recommendations*: And I shall not enter into the Question, "Whether this is to be considered as a " mere *Recommendation* or as a *Condition*."

Thomas's Case in 1 Ro. Abr. 411, 843. seems in Point. If that was a single Heir, that Case is in Point: If not, One Co-Heir may * enter for Both. And no Advantage was here taken of the Condition, before the Recovery was suffered.

*V. Bro. He concluded with saying, that this Condition, or whatever else it may be called, is not such a Limitation as will carry the Estate over to the next Remainder-Man, upon Breach of the Condition enjoined: And therefore the Plaintiff, who is that next Remainder-Man, and only claims as being so, can have no Title to Recovery.

Per Cur'. unanimously—

Let the Postea be delivered to the Defendant.

Howe, Esq. versus Nappier.

Monday,¹⁷ Nov. 1766. A Prohibition had been moved for, to the Court of Admiralty, in a Suit there for Seamen's Wages; upon a Suggestion "that it was by *Deed* executed." It was upon an *East-India Company's Charter Party*: Which are always (as it was said) under Seal.

On the last Day of last Term, Mr. Dunning shewed Cause against the Prohibition; and alledged, that these Contracts used to be *without Deed*: But by 2 G. 2. c. 36. it was provided that they should be *in Writing*, declaring the Wages, and expressing the Voyage. That Act says—"The Agreement shall be made in *Writing*†." But it did not intend to deprive the Sailors of the Benefit of suing in the Admiralty-Court; where they could obtain their Wages in a more summary and expeditious Method, than in the Common-Law Courts.

† Sect. 1. Sir Fletcher Norton and Mr. Walker, contra, argued for the Prohibition: and urged, that the Admiralty Courts have no Jurisdiction, where the Contract is *under Seal*. 2 Sir J. S. 968. *Day et al.* versus *Searle*, 1 *Salk.* 31. *Opy* versus *Addison*. [V. 12 Mod. 38. S. C.] 1 *Ld. Raym.* 577 [See it also in 12 Mod. 405.] *Clay v. Sneygrave*. They proceeded by a different Manner of Proof: They require two Witnesses, the Common Law, only One.

LORD

LORD MANSFIELD—It must turn upon the Suggestion: You may move to amend that.

Whereupon, Mr. Walker made a Motion for that Purpose: And a Rule was granted, to shew Cause why the Suggestion shoud not be amended; and the present Rule was enlarged.

On Friday the 7th of this Month of November, Sir Fletcher Norton moved to make absolute the Rule for amending the Suggestion.

And accordingly, the Rule for amending the Suggestion was then made absolute: And upon the amended Suggestion, it was averred to be a Contract made at Land, (*viz.* at the East-India House, &c.) and that it was under Seal.

And a Rule was made, at the same Time, for Civilians to be heard against the Prohibition.

Dr. Marriott now argued against the Prohibition, and for the Jurisdiction of the Admiralty.

He said He would lay down some first Principles. One of which was, that

A Prohibition must be granted upon *good and legal Cause*.

He admitted that the Court of Admiralty could not hold Plea of Things arising by Deed, in Cases where the Matter is to be *executed on Land*. They are restrained by the Acts of 13 R. 2. Stat. 1. c. 5. and 15 R. 2. c. 3.

It depends upon the *Nature of the Thing*; not upon the Locality.

They may hold Plea of *Contracts for Seamen Wages*, generally. For, the Question is, “Whether they have earned their Wages or not, by the maritime Law:” That is the Point in Issue. The Contract comes in only *incidentally*, not originally. We do not pretend to determine upon Deeds, generally: But here it comes on only *demonstratively*. We can give the Mariners the most effectual Remedy, in Cases of Wages. We can send Commissioners to examine Witnesses: Which foreign Courts of Admiralty will assist. Mariners may *join together* in suing, in our Courts, We examine our Witnesses upon Interrogatories: Which is convenient to Men

of

of that vague Kind of Life. So that they have certain and convenient Justice in the Admiralty Courts.

The Cases where Prohibitions have been denied, on general Contracts for Seamen's Wages, are the following—*Wood versus Bonnithorne*, Sir Thomas Raym. 338. Anonymous, 1 Ventr. 146. and *Wells versus Osmond*, in 6 Mod. 238. Where the true Reason is given, why Seamen may sue for their Wages in the Admiralty, though the Contract be at Land; namely, that there the *Ship* is made liable to them; and there they may *All join in the Suit*: Neither of which may be at Common Law; and yet much for the Ease of poor Seamen.

The first Question is, “How far the Admiralty may hold Plea of Contracts made at Land?”

Now 3 Lev. 60. *Coke versus Cretchett*, and *Middleton versus Scally*, there also mentioned, prove that notwithstanding 13 R. 2. or 15 R. 2. the Admiralty have Jurisdiction to hold Plea of a Charter-party and Contract, though made at Land.

The next Question is, “Whether they can hold Plea of a Deed?” And then, “Whether this be a Deed?”

1st. The Court of Admiralty proceeds by the Common and Maritime Laws of England, as well as by the present System of Maritime Laws in all civilized Countries. The Civil Law pays Respect to a Deed. And the Process of the Admiralty is summary, and more expeditious and easy in its Method of obtaining Seamen's Wages: And more ample Justice may be done, even in the Case of a sealed Contract made at Land. Cases do not make Law: But Law makes Cases.

I suppose the Counsel on the other Side will produce a Case out of *Salkeld*.

But a Case not founded on Principles is no Authority.

The Court of Admiralty are the proper and only Judges of the Service of Mariners. And here, the Whole of the *Libel* is the Hiring and the Performance.

The Suggestion is founded on the two Statutes of 13 R. 2. Stat. 1. c. 5. and 15 R. 2. c. 3.

The Black Book of the Admiralty, (N°. 25. Letter C.) which is coeval with the Red Book of the Exchequer, supposes

poses those Statutes to have proceeded from a turbulent Spirit. They have been the Grounds of Prohibitions to the Court of Admiralty.

Lord Coke laboured to abridge their Jurisdiction in his Writings. But at this Day, the Spirit of these Statutes will not be enlarged.

Therefore He hoped that Court would not put it in the Power of a Company (meaning the *East-India Company*) to oppress their Seamen, by granting a Prohibition in the present Case.

The Litigation in the Admiralty Courts is only *as to the SERVICE.*

Mr. Dunning also argued against the Prohibition.

The Wages being *earned on the High Seas* was the Principle, he said, of the Admiralty Jurisdiction: And the Case of *Opy versus Addison et al.* in 1 Salk. 31. was the first Case to the Contrary; and seems not to have been much considered. Probably, *Bridgeman's Case*, in *Hobart 11.* might be the Ground of that Determination.

The 2 G. 2. c. 36. directs indeed "that the Agreement shall be in Writing." But it did not mean to take away the Admiralty Jurisdiction, so convenient to Mariners. And surely the mere putting a *Seal* to the Agreement in Writing ought not to take their Jurisdiction from them.

The Case of *Day et al.* versus *Searle*, in 2 Sir J. S. 968. is only this—"The Mariners libelled on a Contract under Seal: And a Prohibition was granted, on the Authority of Salk. 31. *Vide 3 Lev. 60. contra.*" Which Note of Reference to 3 Lev. 60. shews that that Case so referred to was not cited or considered in the Case of *Day versus Searle*.

Sir Fletcher Norton *contra*, for the Prohibition.

The Jurisdiction of the Admiralty ought not to be extended; if for no other Reason, yet for this One alone its being *summary*, and exercised by Persons appointed (as they were till very lately) by the Lord High Admiral, and without any Jury.

The Acts of 13 & 15 R. 2. ought to be construed with the greatest Latitude; and not with strict and narrow Limitations: For, they were very beneficial to the Subject; and were made "at the great and grievous Complaint of all the

" Commons, of the Incroachments made by the Admirals
 " and their Deputies, upon divers Jurisdictions, Fran-
 " chises, &c."

The Civil Law is the Corner-Stone of the Admiralty-Jurisdiction; the Hinge upon which it turns: They principally proceed upon *that Law*. These Statutes provide for the Common Law Jurisdiction upon Contracts made *at Land*: and take away their usurped Jurisdiction, both as to Contracts made *within the Bodies of Counties*, (as well on Land as Water,) and also Wreck of the Sea.

By 2 H. 4. c. 11. these Statutes were enforced, and double Damages given against the Pursuant in the Admiral's Court; and also a Penalty of 10*l.* to the King for the Pursuit so made.

The Court are *obliged, ex Debito Justitiae*, to grant this Prohibition: The Proceeding is *coram non Judice*. It is more than discretionary: The Court *ought* to grant it. These Acts of Parliament are to be encouraged and not restrained.

They alledge a *false Fact* in their Libel, by laying the Contract to have been made *at open Sea*. We are not obliged to look for the Cause of Prohibition, in *their Libel*: The *Suggestion*, when true, is the Place to look for it. If the *Suggestion* be *false*, it is traversable; and Costs will follow.

Therefore it must be taken to be *true*. And the two Grounds laid in it, are 1st. That the Contract was made at *Land*, *viz.* at the *East-India House*. 2dly. That it was a Contract under *Seal*.

He admitted the Advantages the Mariner has by suing in that Court; and that the *Ship*, as well as Captain, are there liable. So, the Mariners may All *join*, in suing in that Court. But the examining their Witnesses upon Interrogatories, more than balances all those Advantages: *Vivâ Voce* Examination is greatly more advantageous to the Parties; at least, to the Captain and Owners. So also is the getting clear of the *Detention* of Ships of immense Value, at the Suit of a common Sailor for his trifling Wages. The *East-India Company* gives high Wages, on Account of the Sailors not being intitled to any Wages at all, unless the Ship comes Home: And by this Contract the Sailor waves the Advantage He would have by the Marine Law, whereby He would be intitled to Wages as far as He had earned them *before*, though the Ship should be lost in coming Home. Upon *this Contract*, Service does *not* intitle to Wages: Therefore that alone is a sufficient Cause of Prohibition.

As to the Black Book of the Court of Admiralty—It would have no Weight in a Court of Common Law: Mere especially, if it forbids Lords of Manors to take Wrecks upon their own Manors.

As to the Case of *Coke versus Crettbett*, in 3 *Lev. 60.*—It must be very inaccurately stated: For, the Common Law Courts could not have denied the Prohibition, if the Contract was by Deed.

On a Contract made at Land, the Court of Admiralty can not proceed.

As to a Contract by Deed—They require two Witnesses to prove it: We hold it a good Deed, where it is proved by One Witness only, But they are not trusted to hold Plea at all, where the Contract is under Seal.

The Case of *Opy versus Addison et al.* in 1 *Salk. 31.* is expressly in Point: And a Special Agreement, or its being under Seal, so as to be more than a Parol Agreement, is laid down as the Ground of a Prohibition; where it takes the Case out of the general Usage. And I take it for granted that the Court then had the other Cases under their Consideration.

The other Case, *Day et al.* versus *Searle*, in 2 *Str. 968.* recognizes the Case in 1 *Salk. 31.* and likewise mentions the Case in 3 *Lev. 60.* which ceased to be Law, and therefore ought to be guarded against. The Note of Reference, added at the End of it, means, and is intended to shew, that the Case there reported by Sir J. S. was so determined, notwithstanding the former Case in 3 *Lev. 60.* which was not Law.

As to *Bridgeman's Case*, *Hob. 11*—I own it to be a mere *Dictum.*

Our Ground of Prohibition is “ That the Admiralty has “ no Jurisdiction in Matter of Contract at Land; much less, “ if it be under Seal.”

Their Proceeding according to their Rules would be of the greatest Inconvenience to the East-India Company, who always make special Contracts, adapted to their particular Circumstances.

Mr. Walker argued on the same Side, and to the same Effect.

Lord

Lord Mansfield—A Prohibition is *ex Debito Justitiae*, if the Court of Admiralty proceed contrary to Act of Parliament. However, if I had any Doubt, I should take Time to consider. These Statutes take away their Jurisdiction in *all* Cases of Contracts made upon Land: And yet their Jurisdiction has been allowed in Cases of Contracts made upon Land, with a Mariner “*to serve for Wages*,” in the ordinary and usual Way. There the Contract is only a Memorandum fixing the Rate, and ascertaining the Wages: But the Service at Sea is the principal Matter in Consideration. This has been permitted, for the Convenience of Sailors: The *Gift* and *Foundation* of the Action is the *Marine Service*. They do not, in their Demands there, state a Contract.

But the Cases in 1 *Salk.* 31. and 2 *Str.* 968. are express, “that where there is a *Special Agreement* by which the Mariners are to receive their Wages in any other Manner than is usual; or if the Agreement be *under Seal*, so as to be more than a *parol Agreement*; in such Case, a Prohibition shall be granted.”

The same Case of *Ody versus Addison et al.* reported in 1 *Salk.* 31. is also reported in 12 *Mod.* 38. The Suit in the Court of Admiralty was for Mariners Wages. The Suggestion for a Prohibition was “of a Contract in *Writing* made “for them *at Land*.” The Court said, “that nothing but “constant Practice affirms the Jurisdiction which they “allowed that the Court of Admiralty has in such Case.” But they held that if there be a *Special Agreement* “that Mariners shall receive Wages in *any other Manner than usual*; or if the Agreement be *under Seal*; in both these Cases, Prohibition shall go. They added—“But where it is in *Writing only*, it is but a *parol Agreement*; and therefore they have Power, as here.” Which seems nonsensical; and yet is easily explainable: It means no more than this; “that “if the *common and usual Agreement*, generally made by *Parol*, happens to be put into *Writing merely*, (without Seal “or adding any *Special Agreement*) it is no more than a *Memorandum of the Rate of Wages*.”

The Case of *Day and Others against Searle*, in 1 *Strange* 968. is most express, “that if the Contract is *under Seal*, a Prohibition shall be granted.” And the Note at the End of it, “*Vide 3 Lev. 60. contra*,” means “notwithstanding “the Case in 3 *Lev.* 60. to the contrary.”

Here, the whole Merits may turn upon the Construction of the *Special Agreement*. However, the being *under Seal* is not

not the only Difference between this Contract, and ordinary Contracts for Mariners Wages.

Therefore We are bound, in my Opinion to make the Rule absolute for a Prohibition.

The three other Judges concurred, that as this was a Special Agreement, and under Seal too, a Prohibition ought to be granted. And

Mr. Justice Yates thought the Usage of permitting Sailors to sue in the Admiralty for their Wages, was founded upon this Principle, "that where there is no Special Contract, "their Reliance is on the Credit of the Ship; whether the "Contract be in Writing, or not." In which Case they declare upon the Service; and the Writing is only given in Evidence. But it is otherwise, where they are obliged to declare upon the Deed.

Per Cur^r.

Let the Rule for a Prohibition be made absolute.

Woolley and Another *versus* Idle.

Tues. 18th
Nov. 1766.

THIS was an Action of Debt brought upon a By-Law by Thomas Woolley and Henry Collins, Masters of the Fellowship and Company of Merchant-Taylors within the City of Bath.

The Declaration states the Charter of that City, granted 32 Eliz. with a Power to the Mayor, Aldermen and Common-Council to make By-Laws; and their Acceptance of it; and that Time out of Mind, there had been a certain ancient Guild or Company, called the Fellowship and Company of Merchant Taylors, of which there have been and still are Two Masters; and that there hath been Time immemorial an ancient Custom "That no Stranger-Person hath of Right used or exercised, or of Right ought to use or exercise the Craft or Mystery of a Taylor within the City aforesaid, except He be free of the said City." It then states a By-Law, made 12th May, 4 C. 1. which ordains, "That no Stranger nor Foreigner, at any Time thereafter, should use or exercise the Craft or Mystery of a Taylor within the said City, except He should first be made free of the said City; under a Penalty of 3s. 4d. per Diem, to be paid to the Masters of the said Company of Merchant-Taylors for the Time being, to the Use of the Poor of the said Company." It then charges upon the Defendant, that He having

having Notice of the said By-Law, and being a Stranger and Foreigner, had exercised the Craft and Mystery of a Taylor within the said City, on the 1st of April and two Days afterward, without being free of the City; and thereby forfeited to the Use of the Poor of the said Company the Sum of 3s. 4d. per Day for each of the said Days.

To this Declaration, the Defendant demurred, generally: And the Plaintiffs joined in Demurrer.

Mr. Fearnley, for the Defendant, argued, that this By-Law was void; being contrary both to Common and Statute Law: And he insisted, that the Custom stated did not support it; and was itself bad. He cited 5 Mod. 105. *Robinson versus Grefcourt.* 11 Co. 53. the Case of the Taylors of Ipswich; and Cro. Eliz. 803. the Corporation of Weavers in London versus Brown.

Mr. Dunning, contra, was ready to argue for the Plaintiffs—

But per Lord Mansfield—There is Nothing of Doubt in this Case. The Custom is good; and warranted by a vast Number of Cases. Therefore the Demurrer must be overruled.

Judgment for the Plaintiffs.

Roe, on the Demise of Henry Noden, *versus* George Griffits and Elizabeth his Wife, and Charles Thomas and Mary his Wife. In Trespass and Ejectment.

THIS was a Special Case reserved at the last Summer-Assizes for the County of Surry; where a Verdict was found for the Plaintiff, subject to the Opinion of the Court upon the following Case.

Blackwell North being duly admitted, and seised in Fee of the Premises in Question, (being Copyhold of Inheritance, held of the Manor of Ebbisham in Surry,) in Consideration of a Marriage intended between Him and *Rachel Noden*, on 20th April, 1724, surrendered the Premises by the Rod, into the Hands of the Lord of the Manor, by the Acceptance of the Deputy Steward thereof, (*Thomas Harris*,) to the Use of Himself, his Heirs and Affigns, till Solemnization of the Marriage; then to the Use of the said *Blackwell North* and his Affigns, for his own Life; then to the Use of the said *Rachel* and her Affigns, for her Life; then to the Use of Trustees, during the several Lives of the said *Blackwell North* and *Rachel*, upon Trust to preserve contingent Remainders:

mainders: And after the Deceases of *Blackwell North* and *Rachel*, and the Survivor of them; then to the Use of such Child or Children of the said *Blackwell North* on the Body of the said *Rachel* to be begotten, and for such Estate and Estates, and in such Manner Shares and Proportions, as the said *Blackwell North*, in his Life-time, by any Deed or Deeds, Writing or Writings, duly executed, and attested by three or more Witnesses, or by his last Will and Testament in Writing duly made and published, should limit direct or appoint; and for Want of such Limitation Direction or Appointment, and until such Limitation Direction or Appointment should be made, and until such Estate and Estates so limited directed or appointed, shall respectively commence and take Effect; and as such Estate or Estates, so limited directed or appointed, shall respectively end and determine, to the Use of the Heirs of the Body of the said *Blackwell North* on the Body of the said *Rachel* to be begotten; and in Default of such Issue, to the Use of the said *Blackwell North and of his Heirs and Assigns for Ever.*

Soon after making the said Surrender, the said Marriage took Effect.

On 26th May, 1725, at a Court then holden by the Steward, (*Dormer Parkhurst*, Esq;) it is presented by the Homage, and attested by the said *Thomas Harris*, Deputy-Steward, and recorded and inrolled, "That on the 5th of April then last past, the said *Blackwell North* surrendered by the Rod, and by the Acceptation of the Deputy-Steward, all his customary Messuages, Lands, Tenements, Hereditaments, &c. with their Appurtenances, &c. &c. to the Uses of his Will, in proper Form."

On 27th April, 1743. He made his Will; and thereby gave to his said Wife *Rachel* and her Heirs, All and singular such his Freehold and Copyhold Lands and real Estates, with their Appurtenances, as He Himself, or any other Person or Persons in Trust for Him or to his Use, were or ought to be intitled to or interested in, in Possession, Reversion, Remainder or Expectancy; and all his Estate, Right, Title, Interest, Use, Trust, Inheritance, Claim and Demand whatsoever, either at Law or in Equity, in, to or out of the same, and every or any Part thereof; and also all his Chattels and personal Estate; and made Her his sole Executrix.

On 22d May, 1751, it was, at a Court Baron then holden by *Thomas Harris* the then Steward, presented by the Homage, and attested and inrolled, "That upon the 20th of April which was in the Year of our Lord 1724, the said
" *Blackwell*

" *Blackwell North*, a Customary Tenant of the Manor, for
 " and in Consideration of a Marriage then intended between
 " Him and the said *Rachel* (his now Wife,) did surrender,
 " by the Rod, into the Hands of the then Lord of the
 " Manor, by the Acceptance of the said Steward, (then
 " Deputy Steward thereof)," &c. &c; [setting out the
 said Surrender of 20th April, 1724, *verbatim*, as before
 stated: and also the Admissions of *North* and his Wife, in
 the Words following—] " And afterwards, now also at this
 " Court [22d May, 1751,] the said *Blackwell North* and
 " *Rachel* come in their own Persons, and humbly pray that
 " they may be admitted Tenants to the Lord, to all and sin-
 " gular the Premisses above surrendered, with the Appur-
 " tenances, ACCORDING TO THE TENOR AND INTENT of
 " the same Surrender. And thereupon the Lord, by his
 " Steward aforesaid, and by the Rod, doth now at this
 " Court grant to the said *Blackwell North* and *Rachel* re-
 " spectively, the aforesaid surrendered Premisses with the
 " Appurtenances; To have and to hold the same unto Him
 " the said *Blackwell* for and during the Term of his natural
 " Life; and from and after his Decease, To have and to
 " hold the same unto Her the said *Rachel* for and during
 " the Term of her natural Life; of the Lord, &c. by the
 " Rod and by Copy, &c. according to the Custom, &c.
 " by the yearly Rent, &c. And so the said *Blackwell* and
 " *Rachel* are now admitted Tenants, &c; and have severally
 " Seisin by the Rod. And the said *Blackwell* doth his
 " Fealty: But the Fealty of the said *Rachel* is respited.
 " And the said *Blackwell* giveth for his aforesaid Admission
 " Nothing; BECAUSE He was before admitted to the same
 " Premises; but giveth and prayeth to the said Lord, in
 " Court, for the aforesaid Admission of the said *Rachel*, &c."

*During all this Time, the said Blackwell North served upon
the HOMAGE, as a Customary Tenant.*

In October, 1753, Blackwell North died, without Issue.

*On 21st January, 1754, the said Rachel North (his Widow)
was admitted in Fee to the Premisses, under the said Will of
Blackwell North, her Husband; and surrendered the same
to the Use of her Will.*

*On 21st May, 1764, she made her Will; and devised to
the Lessor of the Plaintiff; and died in June, 1764.*

*On 20th May, 1765, the Lessor of the Plaintiff was ad-
mitted to the Premisses, under *Rachel's* Will.*

The Defendants *Elizabeth Griffits* and *Mary Thomas* are the Heirs at Law of the said *Blackwell North*.

The Question is “ Whether the Plaintiff is intitled to re-cover under the Ejectment ? ”

Mr. Cox, on Behalf of the Plaintiff, the Devisee of *Rachel*, argued that Nothing had been done to revoke the Will of *Blackwell North*.

He said He would premise some Rules which have been lately laid down in Cases of the like Kind : But that He was fighting in the Dark ; not knowing what his Adversary would insist upon.

LORD MANSFIELD—The Other Side had better propose their Objections, and go on.

Mr. Serjeant Leigh, who was for the Heirs at Law of *Blackwell North*, accordingly did so : And his Argument was, in Substance, as follows —

What *Blackwell North* has done since the Making of his Will amounts to a REVOCATION of it.

The Short of the Case is this—*Blackwell North*, being seised in Fee, surrendered to the Uses of his Marriage-Settlement. In this Settlement, He reserved a Power to dispose amongst his Children ; with Reversion to Himself, in Fee.

This Surrender, though made in 1724, was not presented till 1751.

The mere Surrender had no Effect, before the Presentment of it : *Blackwell North* had the whole Fee still in Him.

The Surrender unpresented made no Alteration in the Estate of the Surrenderor. None could happen TILL Admittance : For Nothing passes till Admittance. *Cro. Jac.* 403. *Frostel versus Welsh.* 3 *Bulst.* 214. S. C. (though called there *Roswell versus Welsh.*) 1 *Peere Williams* 14. *Fisher versus Wigg.*

This being the Case, His being sworn upon the Homage and appearing as Tenant, makes no Difference ; because He was Tenant in Fee to the Lord, before : He only continued Tenant. It is not like the Case of a Stranger, summoned by the Lord “ to attend his Court : ” Which may amount to a virtual Admission of Him.

The

The Surrender, to the Use of his Marriage-Settlement, was in 1724 : That, to the Use of his Will, in 1725.

This Surrender to the Use of his Will operated, therefore, upon his first Estate, the *old Estate in Fee*; not on the *new Reversion*.

In 1743, He made his Will, and devised to his Wife in Fee: Under whom the Plaintiff claims.

But the original Surrender of 1724 was not presented till eight Years after his Will was made: And He was thereupon admitted according to the Tenor of the Surrender in 1724; though to different Uses, a little varying from those of the original Surrender.

However, this Description in the Admittance is of no Consequence: For the Surrenderee is in under the Surrender, and *not* under the Admittance; the Lord being merely an Instrument. 1 Ro. Rep. 438. *Lane versus Pannell*; and many other Cases.

And here, the Lord has admitted Him according to the Tenor of the Surrender.

The Difference between the Surrender and the Admittance arose, probably, from Blackwell North and his Wife having, at the very distant Time of the Admittance, no Children, nor Expectation of any after so many Years.

On this Admittance, therefore, He became Tenant for Life, &c. according to the Limitations in the Surrender.

A Surrender varying the old Uses and creating new Ones would undoubtedly revoke the Will.

But the great Point which will be urged against Me, (since the Determination of the Case of *Selwyn versus Selwyn**,) is, "That the Surrender was a Part of the same Transaction; and that the Admittance will refer back to the Time of this Surrender, and All be considered as One Conveyance." And this is the great Difficulty I have to get over.

I shall therefore endeavour to distinguish this Case from that of *Selwyn versus Selwyn*.

That Case turned upon a Recovery: This, upon a Surrender and Admittance.

The

The Surrender in 1724 to the Uses of the Marriage-Settlement passed Nothing OUT of the Surrender : Which is not the Case of making a Tenant to the Præcipe, in a Common Recovery. Again, The Admittance gives the Operation here : But in the Case of a Common Recovery, it is the Deed to make a Tenant to the Præcipe which does it, and is the operative Instrument:

Another Great Ground of the Case of *Selwyn versus Selwyn* was, "to complete the Intention of the Tenant in Tail." And the Whole was therefore taken together, as One Conveyance.

But here, *Blackwell North* had the whole Fee in Him : He had a devisable Estate in Him, before Admittance. And so He thought, Himself : For He waited eight Years to be admitted, after he had made his Will. Therefore he had no Intention to effectuate his Will by this : He only intended to have his Wife admitted Tenant for Life.

Therefore there is no Need nor Reason in the present Case, to couple these Acts together, in order to effectuate his Intention.

This Surrender and Admittance do therefore FOLLOW the Will, and not precede it. Consequently, They are a Revocation of it : And therefore the Lessor of the Plaintiff, who claims under it, has no Title.

Mr. Cox, contra, for the Lessor of the Plaintiff.

A Testator must have the same Estate at the Time of his Death, as at the Time of the Devise : Or else, 'tis a Revocation. **Selwyn versus Selwyn*; and *Doe*, on the Demise of *V. ante,
Odiarne, versus *Whitehead**.

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1131 and
704. respectively.

But it is otherwise, where there is not an Alienation : For, in such Cases, 'tis a Corroboration ; as Performance of a Condition, by One who has an Estate on a Condition ; or getting in an equitable Estate ; or levying a Fine, to confirm Partition. For, where there is no Alienation, it will be no Revocation ; unless an Intention to revoke somehow appears.

Articles to settle Land will not amount to a Revocation : I mean, that they do not, at Common Law, amount to One. 2 *Peere Williams* 328. *Sir Parnard Rider, versus Sir Charles Wager.*

In *Copyhold Estates* there is no NECESSITY of an Admittance, but only in Case of the *Change* of a Tenant: And here was no Change of Tenant. On the first Surrender to the Use of his Marriage-Settlement, there was no Occasion of an Admittance: The Surrenderor and Surrenderee were the same Person. The Lord knew his Tenant; and He could not have compelled a new Admission of Him, even if the Wife had died: And there could be no Admission of the Children unborn. The Lord is only an Instrument. A Person could not be admitted, who was Tenant before: At least, it was not requisite for Him; though it might have been so for his Wife and Children. His continuing to appear as a Homaner, will apply to every Surrender that He shall make afterwards. When he was admitted, He paid Nothing; as having been admitted before: But if He had not been admitted, the Surrender was void; and then the Will would operate upon the old Estate. It might operate as well upon the old Estate, as upon the new Use.

His Admission in 1751 was no Alienation; and there was no Occasion for it: He was only admitted to a less Estate than He had before. The Surrender is the material Instrument: The Admission could not exist without it. If there was no Occasion for the Admission, it can not amount to a Revocation. He was thereby only establishing the Estate upon which He meant the Will should operate. And if it is not void, it must REFER BACK to the Time of the Surrender. *Selwyn versus Selwyn*: (Ante 1131.)

The subsequent Inrolment of a Bargain and Sale will make good the preceding Act. *Godbolt* 270. *Ludlow and Stacie's Case*.

All these together operate as one Assurance. *Selwyn versus Selwyn, Doe, ex Dimiss'*. *Odiarde versus Whitehead*. *Sir John Ferrer and Sir John Curson versus Sir Richard Farmer et al'*. *Cro. Jac. 643*.

A very material Part (the material Part, indeed,) of this Assurance (*viz.* the Surrender) was made before the Date of the Will. This SURRENDER was his own Act: The ADMISSION is not his Act, but the *Act of the Lord*. And the Act of another Person shall not operate as a Revocation. Besides, The Admittance relates to the Surrender. *sir William Jones* 428. *1 Salk. 185, Benson versus Scot. 4 Co. Copyhold Cases* 28, 29*.

* *v. ante,*

* 543.

The Admission is not the Material Part: It is only a Confirmation of his Intention. However, there could not be an Ad-

Admission of *more* than is justified by the Surrender: And it is consistent with the Will.

The Husband neither was nor *could* be admitted to the *Reversion*. The Admission could be good only for the two Lives; because the Interest of *unborn Children* intervened; who could not be admitted, because *not in esse*: And the Wife's Estate was *less* than the Surrender gave Her. Therefore this Admission *could not* be a *Revocation*. It does not destroy the Estate given by the Will.

A Conveyance, after making the Will, could only be a Revocation *pro tanto*. *Lamb versus Parker*, Equity Cases abr. 410. pl. 9.

It is most clear, that *Blackwell North* never meant or intended that this Admission should operate as a Revocation of his Will. It can operate no further than it went: And it went no further than the *Lives* of Him and his Wife.

The Surrender was either void; or so far good, as that the Will operated upon the *old Estate*. If it operated upon the Reversion, it was *no* Revocation.

Mr. Serjeant *Leigb*, in Reply—An *Admittance subsequent* to a Will, amounts to a *Revocation* of it.

The Case of *Lamb versus Parker* was only a *partial Disposition*: This is a *total One*: a Disposition of the *whole Fee*: an Alteration of the old Uses; and a manifest *new Disposition of the WHOLE*.

The Admission here *follows* the Surrender. The whole Uses were varied. This is a total Disposition of the *old Use*; and a Creation of *new Ones*. And they have arisen upon such Admission: They did *not* arise before. A Purchaser under *new Uses* can not be in *before Admission*.

The Will can not operate *both* upon the *old Use* and upon the *new One*.

The great Difficulty with me is that of its *All* being *ONE Conveyance*, and the *Admission's REFERRING BACK* to the Surrender.

In the Case of *Doe, ex Dimiss'*. *Odiarde versus Whitehead*, the Parts could not be separated: But here, the Transactions

tions are *unconnected*. This Testator had a good devisable Fee simple, at the Time of making his Will.

As to his Intention to *confirm* his Will—If he meant to *confirm* his Will, Why did He wait eight Years before Admittance? If He thought He should have no Children, What Need had He to pay a Fine, for Admittance to what both He and his Wife had *before*? There was no Reason for his being admitted in order to *confirm* his Will: And therefore He meant by this Admission in 1751, to *revoke* it.

Lord Mansfield—The Question is, “Whether this Will stands, as a good subsisting Will; or is revoked?”

It has been argued at the Bar, upon the Foot of a Revocation; and “that the Lord took from the Surrenderor, “and regranted to Him again the *whole* Estate;” and “that “this amounts to a Revocation of his Will.”

There is no Colour, upon the Circumstances stated in the present Case, to say that the Testator INTENDED to revoke his Will. An INTENTION to revoke might indeed (if it had sufficiently appeared,) have made a very different Case. Here it is clear that the Testator had no such Intention.

The CHANGE OF ESTATE is, therefore, the only Object on that can be urged in this Case.

Where a Man, seised of an Estate, makes his Will and devises it, and afterwards conveys it *entirely* away: though He takes it back again by the same Instrument, or by a Declaration of Uses; it is a Revocation; because, as it is said in the Books, He has parted with his *whole* Estate.

This Rule being now established, must be adhered to: Although it is not founded upon truly rational Grounds and Principles, nor upon the Intent, but upon legal Niceties and Subtilty. However, as in the Earl of Lincoln's Case*, it

* V. Show-
er's Parl.
Cases 154.
and Abridg.
ment of E-
quity Casés, have been admitted as the Ground of it.

v. I. p. 411,

412. Earl of Lincoln, v. Blackwell North, the Testator, had a REVERSION IN FEE Rolls et al'. ^{do} in Him. And though He limits it to Himself†, the Words † V. ante,
P. 1954.

do not operate: For, the Use results by Operation of Law. This *Reversion in Fee* is the only Subject Matter of the *Devise*. In 1725, He surrenders to the *Uses* of his Will; and afterwards, in 1751, He is admitted, upon the former Surrender (made in 1724,) to the *Uses* of his Marriage-Settlement.

An Admission must follow the *Surrender*: The Lord has no Power over it. The *Surrender* directs and governs the Admission. Therefore the Admission is *prout Lex postulat*: It is no Re-Admission to his REVERSION. It effectuates the *Uses* limited; but leaves the *Reversion* as it was.

This makes an End of the Case: For, here is no Conveyance of the *Fee*, no taking back an Estate in it.

But supposing the *Fee* to have been limited to a *third Person*—I do not think that even in that Case, what has been done by the Testator would have revoked the Will.

It is said, on the Part of the Defendants, “that the *Surrender alone* (unpresented,) makes no Alteration whatsoever.” But I deny that: It is a *Conveyance* of the Ownership of the Estate; and the *Admittance* is only * *Form*. ’Tis * v. ante, a Ceremony derived from the *Origin* of Copyholds: But the 1543 accord, Lord’s Act is, now, mere Form. He can not alter, nor affect the *Surrender*: He is a mere *Instrument*, and *compellable* to admit according to the *Surrender*. A *Mandamus* would compel Him: A *Decree* in Chancery would compel Him. The *Surrender* is a Deposit in his Hands: The Land is bound by the *Surrender*; and the *Admittance* has *Relation* to it.

The Case of *Benson versus Scot* is decisive†, “that the Land is bound by the *Surrender*; and that the *Admittance relates* 185. pl. 3, to the *Surrender*.” This is settled.

If a joint-tenant in *Fee* surrenders to the *Use* of his Will; devises, and dies; and then the *Surrender* is presented; the *Admittance* of the *Devisee* to a Moiety shall ‡ relate to the *Surrender*. The Estate of the Land was bound by the 51. b. Lit, *Surrender*. The *Admittance* is *Form*: It is the *Shadow* to the *Substance*.

If a *Disseizee* makes his Will, and afterwards enters, and then dies; ’tis a good subsisting Will, and not revoked: For, his Entry shall have Relation back to the Time of the *Disseisin*. So, if a *Disseizee* releases, it shall have Relation back. So, an *Escheat*, after the Date of a Will. So, if a Person seised of a Remainder in *Fee* makes his Will; and then

the Tenant for Life dies, in the Testator's Life-time; the Will is not revoked thereby. All these shall relate back.

So here, the Admittance of the Lord shall *relate back* to the Time of the Surrender, and is only a *Completion* of it.

This Case is directly within the Principles of the Case of *Selwyn versus Selwyn*; "That the Whole of a Conveyance shall
" be taken together; and the several Parts of it shall *relate back*
" to the *principal Part.*"

So that either no Alteration at all is made by this Admittance, or, if there be any, yet the Admittance shall have Relation back to the Time of making the Surrender.

Therefore I am most clearly of Opinion "That there is no
" Doubt at all in this Case."

The Other THREE JUDGES concurred in the same Opinion:
And ALL agreed, "that after the Surrender in 1724
" to the Uses of the Marriage-Settlement, the REVERSION
" still remained in *Blackwell North*; and that *no Alteration*

* See many "or Change of Estate happened in this Case."*

of the Cases

here cited, together with more on the same Subject, in Viner, Title Devise (R. 6.)
" Revocation by Act of Law, or Alteration of Estate in Devisor." Page 143 to 151.

Per Cur'. unanimously—

Judgment for the Plaintiff.

Monday 17
Nov. 1766.

Winchelsea Causes.

SEVERAL Rules were depending at this Time, against a large Number of the Corporators of this Borough, for them to shew Cause (respectively) Why Informations in Nature of *Quo Warranto* should not be granted against them, to shew by what Right they claimed to hold their Offices.

The Length of Time that they had been in *Possession* respectively, was very different: Some of them had been in Possession above 20 Years; some of them, near 20 Years; and some of them, considerably less than 20 Years.

THE COURT thought it would be right to fix a certain Point of Limitation, beyond which they would not go back, to disturb a Possession so long acquiesced in. And having

having taken due Time to consider how many Years this quiet Possession ought to have lasted, in order to protect it from future Impeachment; They now publickly declared the Resolution they were unanimously come to; namely, that after twenty Years unimpeached Possession of a Corporate Franchise, no Rule ought to be granted against the Person in Possession, to oblige Him "to shew by what Right he holds it."

This Resolution, they said, was *analogous* to the Rule that had been laid down in several other Cases.

The Statute of Limitations (21 *Jac.* 1. c. 16. *sciz* 1.) concerning Writs of Formedon and Entry into Lands, is confined to twenty Years. The Statute of 10 *W.* 3. c. 14. § 1. concerning Writs of Error is also confined to twenty Years. Courts of Equity do not allow the Redemption of a Mortgage, after twenty Years. Bills of Review have been generally disallowed after twenty Years. Bonds which have lain dormant, shall be supposed to be satisfied, after twenty Years. Ejectments require a Proof of Possession within twenty Years.

So that there is an *Analogy* between this and other Limitations confining the Retrospect to a reasonable Time. And LORD MANSFIELD notified to the Bar, in the Name of the Whole Court, That upon talking over and considering the Subject, They were All clearly of Opinion "that twenty " Years was the *ne plus ultra*, beyond which the Court would " not disturb a peaceable Possession of a Franchise: But that in " every Case *WITHIN* twenty Years, their granting the Rule, " or refusing to grant it, would depend upon the particular " Circumstances of the Case that should be in Question before " them."

Rex *versus* Edwin Wardroper.

Wednesday
19th June,
1766.

TWO Days after such Declaration made by the Court, as above; there came before them several of these Rules " to shew Cause why Informations in Nature of *Quo Warranto* " should not be granted against the several Defendants " claiming Rights as Corporators of *Winchelsea*."

One of the Principal of them was this *Edwin Wardroper*. The Length of Possession of their respective Corporate Offices were (as has been said before) very different: some, above twenty Years; some under. *Wardroper's* Possession was of the Length of nineteen Years and eight Months, after a Re-Election, (which Re-Election had been made for greater Caution;) and of twenty-seven Years from his original Election.

tion. The Objection to Him was *Non-Residency*, sworn against him to the *Belief* of three Persons who made the Affidavits. But He produced *positive* and full Affidavits to the Contrary: And He shewed that the Makers of the Affidavits had voted for Him; and had concurred with his Acting in this his corporate Office, upon many Occasions; and never before objected to the Legality of his Right. He also swore that He had paid Scot and Lot. Whereupon,

Sir Fletcher Norton, on Behalf of the Defendant, prayed that the Rule might be discharged *with Costs*.

Mr. Hervey, Mr. Kemp, Mr. Walker, and Mr. Dunning insisted that the Question turned upon this—" What was a "real; what, a colourable Residence :" And this, they said, ought to be tried by a Jury, not upon *Affidavit*; especially; in a Case like this, where there is no Danger of the Dissolution of the Corporation.

Lord MANSFIELD mentioned the Case of Sir William Tre-
 * V. ante, *Juryney**, who was Steward of the Borough, at the Time of
 vol. 3. his Election to be a Capital Burgess of West Loe. And the
 page 1615. Court discharged the Rule obtained against Him; without
 sending the Question to a Jury.

The Statute of 9 Ann. c. 20. had a View to the speedy Justice to be done against Usurpers of Offices in Corporations, as well as to quiet the Possession of those who had Right. And that Act does not leave it to the Discretion of the Officer, as it was before; but puts it in the Discretion of the *Court*. Therefore the Court must exercise a Discretion. It would be very grievous that the Information should go of Course: And it would be a Breach of Trust in the Court, to grant it as of Course. On the Contrary, the Court are to *exercise a sound Discretion* upon the particular Circumstances of every Case. Now here is no Fact sworn, to impeach the Defendant's Right. Therefore the Court, if it had been nicely attended to, ought not indeed to have granted the Rule. As to the Residence of the Defendant, Nothing more than Apprehension and Belief "that He was not resident," are sworn to: No Fact. But the Defendant swears positively to the Fact, "that He was resident at the Time;" and swears to a Re-Election, made upon a Doubt of a former Election: Which is a Fact of Notoriety in the Place, and a Circumstance leading to believe that He was resident at this Re-Election. And these very Persons who now make the Affidavit against Him, voted at his Election: And they have voted with Him at other Elections. His Re-Election is above nineteen Years ago: And many Others claim under his Rights.

Therefore,

Therefore, on the Merits of this Rule alone, independently, I think it ought to be discharged with Costs, for the Misbehaviour of the Parties applying for it. But if it shall appear that there is Misbehaviour on both Sides, it may be a different Consideration, as to the Costs.

The three Other JUDGES concurred to discharge the Rule with Costs. They said they ought not to encourage vexatious Prosecutions, which tend to throw Corporations into Confusion. Here is a long Acquiescence; though not indeed quite twenty Years: And the Defendant is now attacked without sufficient Grounds. The very Persons who now object to Him have themselves voted for Him, and concurred with Him in his Acts as a Corporate Officer. Their Conduct therefore gives the Lye to their Complaint.

Here is a sufficient Residence proved: And he bore the Burdens of the Corporations, and paid Scot and Lot, which must have been notorious.

This is a hardened, as well as a groundless Application: And if the Court were to make this Rule absolute, They would act contrary to the Words and Spirit of 9 Ann. c. 20. which intended to quiet the Possessions of such as had a Right, as well as for the speedy Removal of Usurpers.

Indeed, no Length of Usurpation shall affect the *Crown*: *Nullum tempus occurrit Regi.* The King will not be bound by our discharging the Rule: The Crown may still bring a *Quo Warranto*. But we are to exercise a just Discretion, and not to promote Vexation.

THE COURT were most clear and unanimous in their Opinion "That the Rule ought to be discharged: And as the Application was so very unreasonable and groundless, they thought that the Case of *New Radnor* [ante, Vol. i. pa. 508. *Rex versus Lewis,*] would warrant their discharging it with Costs. Therefore

*Per Cur*s*.* unanimously—

Rule discharged with *Costs*.

Da Costa

Friday 21st
Nov. 1766.

Da Costa *versus* Firth.

THIS was an Action on the Case, for 200*l.* upon an *In-debitatus Assumpſit*, for so much Money had and received to the Use of the Plaintiff. *Non Assumpſit* was pleaded; and Issue joined. It was brought by an Insurer against an Insuree, to recover back what he had paid him. The Cause was tried before Lord MANSFIELD at Guildhall, at the Sittings after last *Trinity Term*: When it was agreed that a Verdict should be given for the Plaintiff, (with Damages 10*l.* Costs 40*s.*) subject to the Opinion of this Court, upon the following Facts.

A Policy was underwritten by the Plaintiff; being an Insurance upon any of the Packet-Boats that should sail from *Lisbon* to *Falmouth*, or such other Port in *England* as His Majesty should direct his Packets appointed between *Lisbon* and *England*, for One whole Year, commencing 1st *October*, 1763, and to continue to the 1st of *October* 1764, inclusive, upon any Kind of Goods or Merchandizes whatsoever: And it was agreed that the Goods and Merchandizes should be valued at the Sum insured on such Packet-Boat, without further Proof of Interest than the Policy; and to make no Return of Premium for Want of Interest being on Bullion or Goods. And in Case of Loss or Misfortune, the Insured were to be at Liberty to sue labour and travel for in and about the Safe-guard and Recovery of the said Goods and Merchandizes or any Part thereof, without Prejudice to the Insurance; to the Charges whereof the Insurers were to contribute, each One according to the Rate and Quantity of his Sum insured. The Consideration paid by the Insured was 10*l.* per Cent: And in Case of Loss, they were to abate Nothing.

N. B. Corn, Fish, Salt, Flour and Seed were warranted free from Average, unless general, or the Ship be stranded. Sugar, Tobacco, Hemp, Flax, Hides and Skins were warranted free from Average under 5*l.* per Cent. And all other Goods free from Average under 3*l.* per Cent; unless general, or the Ship should be stranded.

The Defendant, Mr. *Michael Firth*, who was One of the Insured, had an Interest in Bullion on Board the *Hanover* Packet, being one of the King's Packets between *Lisbon* and *Falmouth*.

On the 2d of *December*, 1763, it was totally lost off *Falmouth*, in a Voyage between *Lisbon* and *Falmouth*: And the Loss was adjusted, in Writing under the Policy, in the Words following—

" Adjusted a Loss on this Policy at 100l. per Cent; the
" Hanover Packet, Captain Sherborn, being totally lost at
" Falmouth.—Should any Salvage be hereafter recovered, the
" Insured promises to refund to the Insurers whatever He may
" so recover, in such Proportion as the Sum insured bears
" with the whole Interest. London 23d October, 1764 for
" Richard Seward—Michael Firth."

And the Fact seems clearly to have been (though the Case does not state it,) that the Insured paid the whole Money insured. Indeed, this very Action shews that he must have paid it: Because the End and Intention of the present Suit is to oblige the Defendant to refund it, as having received it without a just Right to do so.

In April 1765, the Iron Trunk which contained all the Bullion, was fished up; and thereby All the Bullion recovered, without any Loss or Prejudice whatever; and delivered to the Defendant.

The Defendant's Expence of Salvage amounted to 63l. 8s.
2d. And, deducting that Sum for Salvage, the nett Proportion of his Share came to 206l. 11s. 9d.

The Plaintiff's Proportion thereof, in Respect of his Subscription, amounted to 48l. 4s; which was paid into Court.

The Question was " Whether the Plaintiff, upon this Case, was not intitled to recover in this Action."

Mr. Mellish, on Behalf of the Plaintiff (the Insurer,) argued 1st. That the Contract was performed; and that the Loss can not be considered as a total, but as an Average Loss: 2dly. That the special Agreement "to allow the Insurer in the Proportion of the Sum insured to the whole Interest," made no Difference.

In Support of the first Position, He cited the Case of *Hawilton versus Mendes*: Which may be seen at large, in Vol. 2. p. 1198. and fully abstracted, in the Index to that Volume, under Title, " Policy of Insurance."

The Insurance is on the safe Delivery of the Bullion, according to the real and true Spirit of it. It is not an Insurance upon the Ship: Neither is it a Wagering-Policy, nor a Cover of a Wager.

The

The Money was paid on a *Supposition* of a total Loss : But this was *not* a total Loss. To prove which, he cited *Bynkerhoeck's Questiones publici Juris*, c. 7. and *Fitzgerald versus Pole*, in the House of Lords in 1754.

So here, it could not be considered as a total Loss : For, the *Spes recuperandi* was not gone. Here was an *actual Salvage*. It can not be an Average Loss : For, *All* was saved. Therefore the Contract was performed. And consequently We ought to receive the Money back again.

Secondly—This Contract was not altered by the Adjustment and Agreement “to refund to the Insurers whatever ‘‘ might be recovered, in the Proportion of the Sum insured ‘‘ to the whole Interest.” But this Salvage must be estimated according to the Value estimated in the Policy : *Lewis and vol. 2. Another versus Rucker**. In that Case, the like Proportion at page 1167, which the Sugars were valued in the Policy, was paid, as the 1172, 1173. Price of the damaged Sugars bore to sound Sugars, at the Port of Delivery.

Therefore as the *Whole* is recovered, the Whole of the Value must be refunded : For, this is merely the Case of a Salvage.

Mr. Wallace *contra*, for the Defendant, argued that He could not be compelled to refund.

The Money was paid *bonâ fide*, and under a full Apprehension of the Facts : And it did not exceed the Loss at the Value fixed by the Policy. It was a *total Loss*. If the Goods are recovered, they are the Insurer's ; and He may make what He can of them. The Recovery of them may happen at a vast Distance of Time.

Roccius, Notabilia, page 204, is in Point, “That it is in ‘‘ the Election of the Insured.” Otherwise, the Insurer might profit : Which he ought not to do.

Secondly, Upon the Special Agreement—It was adjusted, “That if any Salvage should be afterwards recovered, the Insured should refund to the Insurers whatever he might so recover, in such Proportion as the Sum insured bore to the whole Interest.”

And we have paid the Money in that Proportion, into Court. The

The Change of Property does not take Place between the Insurer and the Insured.

In the Case of *Fitzgerald versus Pole*, the Insurer was not liable under that Policy. The being a *valued* Policy refers only to a *total* Loss: It does not affect the Case of an *Average*-Loss.

This is a mere *Wagering-Policy*: And therefore the Loss having happened, the Whole is to be paid by the Insurer.

Mr. Melliss, in Reply—This is *not* a Wagering-Policy. It is a *valued* Policy: And the Loss is only an *Average*-Loss.

As to a *limited Time* for the Recovery—It is not till after the *Spes recuperandi* is gone. Here, it clearly was not gone.

As to *Roccius, 204*—The Insured has made his *Election*: For He took the Bullion from the Bank.

As to the Point of its being a *Wagering Policy*—'Tis within the Words of 19 G. 2. c. 37. Therefore they ought to shew that They are within the Exception. But it is not within either the Words or Meaning of the Exception. The Words of the Statute are “ Goods and Merchandizes.” And there never was a Wagering-Policy without the Words “ Free of Average,” and “ without Benefit of Salvage.”

The Statute prohibits assuring, Interest or no Interest. But here was an Interest: The Bullion was undoubtedly an Interest. And a real Advantage might accrue to the Public, by bringing in Bullion: Whereas a mere Wager is no Benefit to the Public. Therefore the Exception must be restrained to such Cases as the Public can receive *no Benefit* from, but may rather receive a Prejudice.

THE COURT agreed that this was a Policy of a *peculiar Sort*; and within the Exception of the Statute of 19 G. 2. c. 37.

It is a *mixed* Policy; partly, a Wager-Policy; partly, an open One: And it is a *valued* Policy, and fairly so, without Fraud or Misrepresentation. Therefore the Loss having happened, the Insured is intitled as for a *total* Loss.

The Insurer agreed to the Value; and is concluded to dispute it. The Insured has received the Money as for a Total Loss: And there is no want of Conscience in retaining it.

*^{Ante, 1167} The Cases of * *Lewis and Another versus Rucker, † Ha-*

†^{Ante, 1198} *milton versus Mendes, and ‡ Goss and Another versus Withers*

‡^{Ante, 683.} —were only “ that where the Average-Loss appears before
“ Adjustment, the Under-Writer shall pay only the *real*
“ Damage.” And the Reason is—That the Insured must
shew the whole Case, as it then stood. In the present Case,
there was a total Loss at the Time of the Adjustment.

The Adjustment in this Case makes an End of the Question. Here is a solemn Abandonment, and a solemn Agreement “ that the Insurers shall be content with Salvage in “ such Proportion as the Sum insured bears to the whole “ Interest.” There was a total Loss at the Time of the Adjustment; (which is the same as if the Damages had been then recovered on an Action.) Here is no Sort of Fraud; nor any Thing that is against any Law: And to refund more than in that proportion would be contrary to the Under-Writer’s own Agreement.

Therefore the Net Proportion only, in Respect of the Plaintiff’s Subscription, after Deduction of Salvage, ought to be returned to Him: And that is paid into Court.

Per Cur’. unanimously—

The Postea to be delivered to the Defendant.

N. B. This Sort of Policy was agreed not to be novel in Practice; though New in Westminster-Hall; no such having come in Question there.

Saturday 22 Nov. 1766. Doe, on the Demise of Mary Beyer, *versus Roe.*

IN Ejectment. Upon shewing Cause against a Motion to set aside a Writ of Possession for Irregularity, for that the Lessor of the Plaintiff died before the Writ of Possession was actually sued out.

The Facts were, That the Lessor of the Plaintiff died on the 1st of March: After which Event, the Writ of Possession was taken out. But it was *tested* on the last Day of the preceding Hilary Term; returnable on the first Day of the following Easter Term.

Master Owen certified “ that this Proceeding was regular:” And He said, that it would have been so in any other

other Case, as well as in an Ejectment; by Reason of the Writ's Relation to its *Teste*.

THE COURT were clear, "that the Proceeding was regular." And they thought the Circumstances of this Case did not intitle the Defendant to any extraordinary Favour. This is an Ejectment brought by *John Doe*: and the Defendant does not shew that *John Doe*, the Plaintiff in this Action, is dead. However, the legal Relation to the Day of the Teste is proper to be supported, in Maintenance of a Writ of Possession on a Judgment in Ejectment.

The Rule was discharged with Costs.

Farmer versus Sir Robert Darling.

Monday 24
Nov. 1766.

ON Thursday last, Sir Fletcher Norton, on Behalf of the Defendant, moved for a New Trial, and to set aside the Verdict, which had been given for the Plaintiff in an Action for a malicious Prosecution, with 250*l.* Damages, at the Middlesex Sittings at *Nisi Prius* before Lord Mansfield, on the 15th Instant.

His Objections were—1st. That the Damages were excessive: 2dly. That the Verdict was against Evidence.

He had a—

Rule to shew Cause.

Lord MANSFIELD now reported the Evidence—

It was an Action for a malicious Prosecution of the Plaintiff, by two Indictments for Nuisances; One, by a Drain; the Other, by his Poulterer's Yard; both of them near the Prosecutor's House: Upon which Indictments the then Defendant and now Plaintiff had been acquitted.

It appeared, upon the Report, "that there was Malice implied;" And it appeared, that the Plaintiff had actually and bona fide paid 140*l.* in defending Himself against the two Indictments.

His LORDSHIP said, He told the Jury, that the Foundation of this Action was MALICE; which must be either express, or implied: And He acquainted them, that They were not obliged to give All the 140*l.* expended; or, They might (on the other Hand) give more, if they should see it proper to do

do so. He said, He left it to the Jury, to consider of the implied Malice, from the groundlessness of the Prosecution.

Sir Fletcher Norton, Mr. Morton and Mr. Recorder Eyre, now argued on Behalf of the Defendant, for a New Trial.

They said, there was another Requisite to the Maintenance of this Sort of Action, *BESIDES Malice*: It was also necessary to prove "That the Indictment was *causeless* and *without any Foundation*." But these are *essential*, and necessary to be proved.

As in a Writ of Conspiracy, *Falsity* is necessary to be charged; So in this Case, *Malice ALONE* is not sufficient: It must also be a Prosecution *without any Foundation*. These are two *independent* Essentials to the Maintenance of this Action: There must be both *Malice and FALSITY*.

We admit there was *some Evidence of Malice*: But it was proved, by sufficient Evidence, *to be a NUSANCE*. Therefore there was a *probable Cause* for the Indictments: And if there was, then the Prosecutor is not liable to this Action for a malicious Prosecution; whatever Motive might induce the Prosecutor to indict the Person guilty of the Offence. It would be of dangerous Consequence, to make a Prosecutor liable to this Action, where there is a *probable Cause* for indicting an Offender.

Secondly—The Damages are *excessive*. And the Court may grant a new Trial in Matters of *Tort*.

The Bill of 140*l.* was greatly *over-charged* in many Articles. It ought to have been proved to have been *properly paid*, as well as *bonâ fide*. But this Bill is not so. For *some* Articles in it, there were no Vouchers; and some of them are too general; as, (for Instance,) "Sundry Expences, "fourteen Guineas."

The Counsel for the Defendant alledged, that seventeen Witnesses proved—"that the Nusance *existed*:" One of whom was the Foreman of the Grand Jury. And they also alledged, that it was fully proved, "that Sir Robert Dar-
"ling did think, and had *good Reason* to think, that it *was*
"a Nuisance."

Besides, *Farmer* Himself was the Occasion of its running to so great Expence: For, the Indictments were found at *Hicks's Hall*; and *He* removed them hither, by *Certiorari*. It was *He* also that moved for a *View*: To which Sir Robert D. consented, when *He* needed not have done so. The Defendant in the Prosecution could not suffer any more Damages

mages than the *Money out of Pocket*. There could be no Injury *but to his Property*: There was None, to his *Fame*. He could be intitled to no Compensation for any Thing *else* but pecuniary Damage: And the Jury could take nothing further into their Consideration, as the Measure of the Damages they were to give. 1 *Salk.* 13. *Savil versus Roberts.*

Mr. *Stowe*, and Mr. *Wallace contra*, for the Plaintiff, denied the Damages to be excessive at all; much less against a Man of great Fortune: Which a Sheriff of *London*, they said, must be supposed to be, at least as far as 15000*l*; for otherwise, He might have been excused from serving the Office by swearing Himself off. This Prosecution of the Indictments was at the Peril of the Defendant's Trade: Which would have been destroyed, if the Prosecution had succeeded.

Upon the *whole Evidence*, We proved, and the Jury believed, that the Indictments were *groundless*, as well as malicious.

In such an Action as this, the Court can not measure the Damages by any certain Rule: They have none to go by. The Articles in the Bill of Costs were all of them necessary Expences to the Plaintiff, in Order to defend Himself against these Indictments; and were ready to have been proved, if objected to at the Trial: And the Whole was proved to have been *bonâ fide paid*. And he had Reason to remove them from a Court where the Prosecutor would have been upon the Bench.

The Distress and Vexation, and all the Inconveniences the Plaintiff was put to, may fairly be taken into the Consideration of his Damages, as well as the pecuniary Expences.

LORD MANSFIELD—

This Action is for a malicious Prosecution, without a probable Cause.

I can not say that the Jury have done wrong here, in finding that the Indictments were preferred without probable Cause.

This Drain was an ancient Drain. The Fault arose above and below *Farmer's* Part of it. His Brick-Drain was cleaned, and clear. The Gift of the Indictment was "that He did not lower his Drain." He had no Need to do it.

The Verdict was not, in my Opinion, against Evidence.

The

The next Prosecution was for the Feeding the Fowls. And I can not say that the Jury had no Reason to find this likewise to be an Indictment without probable Cause.

Every Stench is not a Nusance: Nor is every noisome Trade a Nusance, in every Place; though many of them are Nusances by Reason of their Locality. This was an ancient Trade, long carried on in this Place; long before Sir Robert Darling came there. He comes and builds a House near it, in a Place that was formerly a Poultry-Yard. No-BODY before complained of it, or presented it. So that the Conclusion does not follow, "that it was a *Nusance*." And the Jury had a *View*. Therefore I can not say, that the Jury had no Reason to take the Prosecution to be groundless.

As to the Excessiveness of the Damages—It does not appear by the Verdict, how far the Jury gave it upon the *Bill*; and how far, upon the whole *Circumstances* of the Case taken together.

The End and Tendency of these two Indictments was to drive the Plaintiff from his Business of a Poulterer, after having long carried it on. This was sworn to have been the Prosecutor's View in preferring them. And they might affect the Man's *Credit*.

There are many Circumstances which make it reasonable, not to indulge the present Defendant in sending it to a New Litigation, only to abate the *Quantum* of the Damages, when he has been so much in the Wrong.

Therefore He was against granting a New Trial.

The THREE OTHER JUDGES entirely agreed with his Lordship in both Points; and expressed their Sentiments at large, to the same Effect. They likewise agreed with Sir Fletcher Norton, as to the Grounds of this Sort of Action; viz. "That Malice, (either express or implied,) and the "Want of probable Cause must both concur." But they were clearly of Opinion, that it appeared upon the whole State of the Evidence, that in this Case they did Both concur. Therefore They thought the Rule ought to be discharged. Both Objections being sufficiently answered.

Per Cur'. unanimously—

RULE DISCHARGED,

Wilson,

Wilson, Widow, *versus* Sir Thomas Sewell, Knt. Tuesday 25 Nov. 1766.
Master of the Rolls.

THIS was a Question concerning the Validity of two Leafes made by Sir *Thomas Clarke*, late Master of the Rolls; One, in 1755; the Other in 1762.

It had been long and often litigated; and in different Shapes.

It first came before the Court upon a Special Verdict, in an Ejectment brought by *John Doe*, on the Demise of Sir *Thomas Sewell*, against *Edmund Wilson*, Esq; and was argued by Mr. *Ashurst* for the Plaintiff, and by Mr. *Dunning* for the Defendant, on Friday 15th November, 1765; after which, it stood for further Argument. And on Thursday 23d January 1766, Lord *MANSFIELD* mentioned, that it might perhaps be desirable to the Parties, to have it judicially determined, "Which of the two Leafes (*viz.* of 1755, or of 1762,) was "the subsisting Lease: Which Question, as the Matter then stood, might happen not to be determined. He proposed, therefore, to have that Question brought before the Court, at the same Time with the other, by a fictitious Issue. Which Sir *Fletcher Norton*, on behalf of Sir *Thomas Sewell*, and Mr. *Dunning* on Behalf of the Defendant *Wilson*, then agreed to.

Afterwards, on Thursday 6th February, 1766, on Lord *MANSFIELD*'s inquiring "what was become of this Case," Sir *Fletcher Norton* answered, "that the Issue was before "Counsel." He added, that He believed they should drop the Verdict, and proceed upon the Issue. Lord *MANSFIELD* replied, that he thought they were right.

Accordingly a feigned Issue was settled; and a Special Verdict found upon it.

It must be noted, that in this new Method of Proceeding, the Names of the Plaintiff and of the Defendant were reversed. Sir *Thomas Sewell* was the Lessor of the Plaintiff, upon the former Proceeding; and *Wilson*, the Defendant; But now, *Wilson's* Widow was made Plaintiff; and Sir *Thomas Sewell*, Defendant.

The feigned Issue was upon a supposed Wager, concerning these two Leafes. The Declaration contained two Counts: And Issue was joined to each. In the former,

Mary

Mary Wilson is alledged to have affirmed, that the Lease of
 " 1755 was a good valid and subsisting Lease for the then
 " Residue of the Term :" Which Sir *Thomas Sewell* denied.
 In the latter she is alledged to have affirmed the like concerning
 the Lease of 1762 : Which Sir *Thomas* also denied. So
 that issue was joined on both Counts.

The Special Verdict finds, as follows. First, It finds the Act of Parliament made on the 25th of April Anno 12 Car. Regis 2d. No. 49. " An Act empowering the Master of the Rolls for the Time being to make Leafes for Years, in Order to new-build the old Houses belonging to the Rolls." Which Act, after reciting " that the Mansion-House Ground and Tenements with the Appurtenances belonging to the Master of the Rolls as Master of the Rolls are much out of Repair, and not capable of Improvement in Regard the former Masters of the Rolls were not enabled to grant such Leafes and for such Terms as might encourage Tenants to build and to repair," does therefore enact " that the Master of the Rolls for the Time being, and his Successors Masters of the Rolls, shall have good Right full Power and lawful Authority, during the Time he or they shall continue Master of the Rolls, by Writing indented under Hand and Seal, to grant and make Leafes for one and forty Years or for any lesser Term, to commence from the Making of any such Leafes, of all and singular the Premisses or any Part thereof, (the Chapel of the Rolls, with a convenient Mansion-House Court-Yard Garden Stable Coach-House and other Out-Houses and Buildings fit for the Use and Habitation of the Master of the Rolls, only excepted:) Which Lease and Leafes so to be made shall be good and effectual in Law to all intents and Purposes, as if such Master of the Rolls for the Time being as shall so make the same had been seised of the Premisses of a good Estate in Fee simple. Provided that in Leafes where Provision is made for new Building of Houses or Tenements, the yearly Rent of twenty Shillings at the least shall be reserved upon every Lease of such a Quantity of the said Premisses as shall be set out and assigned by the Master of the Rolls for the Time being for any one House or Tenement to be built upon; and that in Leafes where there is no Provision for new Building, the like usual Rent that hath been paid or reserved for the greater Part of seven Years now last past, or more, shall be yearly reserved. PROVIDED also that the Master of the Rolls for the Time being, or any succeeding Master of the Rolls, after the Premisses have been once letten according to the Power given as aforesaid, shall not grant or make any NEW or CONCURRENT Lease, until within seven Years of the Expiration of the Lease then in being;

" nor

" nor for any lesser Rent than was reserved upon the former
 " Lease ; nor for any longer Term than for the Term of
 " one and twenty Years from the making of such Lease."

Then the Verdict finds the Grant of the Office to Mr. Verney, dated 9th October 12 G. 2. And that the said John Verney, so being Master of the Rolls, in Pursuance of the Power and Authority given him by the said Act of Parliament, afterwards and before the making of the Lease in the first Count mentioned, to wit, on 18th March 1740, did make a Lease to Mr. Robert Harley and Mr. Charles Frewen, (the Tenor of which Lease they find,) of a Part of the Premises (Serjeant Skinner's House,) for 21 Years from the Making ; at the yearly Rent of three Pounds. And the Jury find these to be the same Premises as are specified in the Declaration.

The Verdict then finds the Death of Mr. Verney, on 10th August 1741 ; and the Grant to * Sir Thomas Clarke, dated * N. B. Sir 29th May, 27 G. 2.

T. C. was
not the im-

mediate Successor to Mr. Verney. For, Mr. Justice William Fortescue, third Judge of C. B. succeeded Him, in Michaelmas Term 1741. He died the 16th December 1749 ; and was succeeded by Sir John Strange. Sir John Strange died on 18th May 1754 : And Mr. Clarke kissed Hands and was knighted on the 18th May 1754.

It then finds, that Sir Thomas Clarke, so being Master of the Rolls, in Pursuance of the Power and Authority given Him by the said Act of Parliament, did on the 9th June 1755 make a Lease to Mr. Charles Deaves and Mr. John Harrison, (the Tenor of which is found,) of the same Premises (then in the Occupation of Sir Samuel Prime,) for 21 Years from the Making ; at the yearly Rent of three Pounds. This Lease not only recites the Act of Parliament, (which was also recited in Mr. Verney's Lease,) but it also recites Mr. Verney's Lease to Harley and Frewen, and " that more than fourteen Years of it are already elapsed ; so that the said Lease is at this Time within less than seven Years of expiring." And the Jurors find this Lease of 9th June 1755 to be the same Lease, and comprising the same Premises, as are mentioned in the first Count of the Declaration.

They find that John Harrison died, after the Execution of the said Indenture of 9th June 1755, and before the Execution of the Indenture of Lease next after mentioned ; to wit, on 1st September 1755 ; and Charles Deaves survived Him.

They further find, that the said Sir Thomas Clarke, so being Master of the Rolls, did afterwards, to wit, on 5th January 1762, make a certain other Indenture, purporting to be

a Lease between Him the said Sir *Thomas Clarke* and *Samuel Seddon* and the said *Charles Deaves*, (which they also find the Tenor of,) demising the same Premisses to them for 21 Years from the Making ; at the yearly Rent of three Pounds. This Lease likewise (as well as the former, of 9th June 1755,) recites the Act of Parliament, and Mr. *Verney's* Lease to *Harley* and *Frewen* ; and " that more than fourteen Years of " it are already elapsed ; so that the said Lease is at this " Time within less than seven Years of expiring." And they find, that this Indenture of 5th January 1762, is the same Indenture as is mentioned in the last Count of the Declaration ; and the Premisses comprised in it, and in the Lease dated 18th March 1740, and in the Lease of 9th June 1755, are one and the same Premisses. And they find that *Sedden* and *Deaves* did, at the Time of the Execution of the said Indenture of Lease dated 5th January 1762, execute a Counter-part of it to Sir *Thomas Clarke*.

They find, that Mr. *Deaves*, the then surviving Lessee in the Lease of 9th June 1755, afterwards did make an Indenture of Surrender between Him and the said Sir *Thomas Clarke* : Which Indenture, under *Deaves's* Seal, and duly executed by Him, was produced in Evidence, and found in *hæc Verba*. It is dated 4th January 1762. This Surrender includes many other Rolls Leafes besides the Subject of the present Question : And it recites " that they were made to *Deaves* " and *Harrison*, in Trust for Sir *Thomas Clarke* his Execu- " tors and Administrators ; and that *Harrison* was dead, " whereby the Estate and Interest became vested in *Deaves* " in Trust as aforesaid ; and that Sir *Thomas Clarke* was de- " sirous that they should be surrendered to Him, the better " to enable Him to grant new Leases thereof." And they find that Sir *Thomas Clarke accepted* of this Surrender. And they find, that the said Indenture of Lease dated 9th June 1755, of the Premisses, to the said *Deaves* and *Harrison*, is One of the Indentures of Lease mentioned in the said Surrender, and thereby surrendered by said *Deaves* to Sir *Thomas Clarke*. But they find, that the said Indenture of Surrender, though bearing Date and purporting to be made the fourth Day of January 1762, was NOT IN FACT EXECUTED until and upon the fifth Day of June 1764.

They find, that Sir *Thomas Clarke* died on 13th November 1764 ; and the King granted the Office to Sir *Thomas Sewell*, by his Letters Patent under the Great Seal, bearing Date the 4th of December in the fifth Year of his Reign. And they find the Premisses to be Part of the Estate belonging to the Office of Master of the Rolls, and mentioned in the Act as belonging to the Master of the Rolls for the Time being, as Master of the Rolls.

But

But whether &c. If it shall seem to the Court, that the Lease mentioned in the first Count was a good valid and subsisting Lease for the then Residue of the Term, then they find so, and assess the Plaintiff's Damages to 10*l.* and Costs, 40*s.* And they find the like, as to the Leases mentioned in the second Count. But if it shall appear to the Court, that the Lease mentioned in the first Count was not a good valid and subsisting Lease &c. then they find "that it was not," as the said Sir Thomas hath above in pleading alledged. And the like, upon the second Count.

The very short State of the Case is no more than this—
Mr. Verney made a Lease for 21 Years from 18th March 1740: Which would consequently expire on 18th March 1761. Sir Thomas Clarke made a Lease of the same Premises, on 9th June 1755, for 21 Years, in Trust for Himself: And on 5th January 1762, he made another Lease of the same Premises for 21 Years, in Trust for Himself. On 5th June 1764, there was an actual Surrender, duly executed and accepted, of the Lease of 1755. Sir Thomas Clarke died. Sir Thomas Sewell, now Master of the Rolls, disputes the Validity of either of these two Leases, of 1755, or 1762. All this Matter appeared at full Length, upon a Special Verdict.

The Questions were Three— •

1st. Whether the Lease being made *in Trust for Himself*, was not a Fraud upon the Trust; and therefore void.

2dly. Whether the Lease of 1762 was not void, because there were *more than seven Years to run*, of the Lease of 1755.

3dly, If the Lease of 1762 was void, whether the Lease of 1755 was not absolutely gone; either by the *implied Surrender* in 1762, or the *express Surrender* in 1764.

On Friday 21st November 1766, Sir Fletcher Norton argued for Sir Thomas Sewell; and his Argument proceeded on the Tuesday following: Mr. Morton argued for the Nominal Plaintiff; (for, in reality, the Dispute lay between the Representatives of Sir Thomas Clarke, and the present Master, Sir Thomas Sewell.)

And on this latter Day, THE COURT delivered their Opinions *seriatim*.

As to the first Point—They held, that its being *in Trust for Himself* was no Objection. It makes no Difference, with

Regard to the Successor: He will receive the accustomed Rent; and if the Lease is in all other Respects regular, it signifies Nothing to the Successor, whether One Person or Another gets the beneficial Profit upon it.

As to the second Point, (which turned upon the Construction of the Act of Parliament of 12 C. 2.)—They all held that the Lease of 1762 was a good *valid* and *subsisting* Lease. They thought that the Words “*New*” and “*con-*“*current*,” which are used in the Act of Parliament, meant the same Thing: (Except Mr. Justice *Hewitt*, who did not deliver any Opinion on this Question.) They did not think it necessary that the former Lease must be *run out* within seven Years of its Expiration by *Effluxion of Time*, (which was the Doctrine that Sir *Fletcher Norton* would have advanced;) but that a former Lease might be *surrendered* at any Time, and that a *Surrender* was as much within the given Power, and within the Intention of the Legislature, as *Effluxion of Time*; and that they meant no more than to give every Master of the Rolls for the future, a Protection from being incumbered for a longer Time than 21 Years, by the Leases of Predecessors. They thought, consequently, that this Lease of 1762 did not break in upon the Power; as it does not charge the Reversion longer than 21 Years in the Whole. And it was observed by Lord *Mansfield* and by Mr. Justice *Hewitt*, that as this Estate was in *Houses*, it might happen to be very inconvenient, if the Tenants might not surrender their Leases within less than the last seven Years of their Terms, in order to rebuild their Houses, in Cases where it might be necessary. And it seemed to be their Opinion, that the Master of the Rolls might take Surrenders and make Re-Grants, *toties quoties*: And that his having executed the Power once, did not prevent him from repeating it.

As to the third Point—They held the Acceptance of the Lease in 1762 to be an * implied Surrender of the Old Lease
* V.C. Litt. 338 Hutton in 1755.
 104. Watt.

Maydewell. But they seemed to agree, that if the Lease of 1762 had not been a good Lease, then the Acceptance of it would not have implied a Surrender of the former One of 1755. For, it was not reasonable in itself, nor could it be the Intent of the Parties, that an Acceptance of a bad Lease should be an implied Surrender of a *good* One. This is not only agreeable to Principles and Common Sense, but has been deter-

† See also *Minim*: It was so resolved in the Case of *Lloyd and Gregory*; the Cases (which is best reported in Sir *William Jones* 405. 406.) † If cited at the a Surrender is intended for a particular Purpose; and that End of Watt Purpose, the only Motive of it, fails; the Surrender ought to fail too.

Upon the Whole—

THE COURT concurred in giving

JUDGMENT for the Plaintiff, upon the Issue on the Validity of the Lease of 1762; and for the defendant, upon the Issue on the Validity of the Lease of D 55.

Lake, Esq. Sheriff of Hertfordshire, *versus* Turner and Harley, Esqrs. (Roll 498.)

THIS was an Action of Debt for 464*l.* 7*s.* 6*d.* upon the Statute of 29 *Eliz.* c. 4. “to prevent Extortion in Cases of Execution,” brought by the Plaintiff, as Sheriff of Hertford, against the Defendants, Sheriffs of London, for his Poundage upon a *Testatum Capias ad satisfaciendum* prosecuted by them out of the Court of Exchequer, against one George Gibbs, for a Debt of 18473*l.* 2*s.* at their Suit, as the King’s Debtors; upon which Writ, the Plaintiff had arrested the said George Gibbs: Whereby he became intitled to demand and have of the Defendants the aforesaid Sum of 464*l.* 7*s.* 6*d.* that is to say, twelve Pence for every twenty Shillings of 100*l.* Parcel of the said Debt and Damages, and Six-pence for every twenty Shillings of the Residue of it.

The Defendants in their Plea set forth a Prosecution by the Attorney-General on Behalf of his Majesty, in the Court of Exchequer against Charles Gibbs, for Customhouse Forfeitures and Penalties; whereupon Exchequer-Proceses issued against the said Charles Gibbs, directed to them; by Virtue of which Proceses they arrested Him, and took Bail for his Appearance. That George Gibbs was his Surety upon this Occasion, and executed a Bail-Bond to them in the Sum of 18473*l.* 2*s.* conditioned for Charles Gibbs’s Appearance at the Return of the Writ. That Charles did not appear. Whereupon they put the Bail-Bond in Suit in the Exchequer, and recovered against Charles the said 18473*l.* 2*s.* Debt and 56*s.* 8*d.* Damages: And upon this Judgment they prosecuted the said *Testatum Capias ad satisfaciendum* against the said George. And they aver “that the aforesaid Judgment “against the said George Gibbs was had and obtained, and “the said Writ of *Capias ad satisfaciendum* was prosecuted “by them, at the *Instance* and on the *Behalf* and *Account* “and for the *Benefit* of his said MAJESTY, and *at his said* “MAJESTY’s *Costs and Charges*;” Whereof the said *Libe*
Lake

Lake, (the Plaintiff,) at the Time of the Delivery of the said Writ to Him to be executed, had Notice.

To this Plea the Plaintiff demurred : And the Defendants joined in Demurrer.

Mr. *Ashurst*, on Behalf of the Plaintiff, argued that this was a bad Plea.

Nothing appears to vary this Case from the general Rule.

1st. This is *no Trust* for the Crown.

2dly. *This Court will not take Notice of a Trust.*

First—The Act of 23 H. 6. c. 10. § 1. does not make the Sheriff liable to an Action. *2 Saund. 59. Postern versus Hanson and Hooker, Vic. Midd. 2 Mod. 177. Ellis versus Yarborough. 1 Mod. 239. Page versus Tulze.* The not bringing in the Body at the Return of the Writ, is not actionable : It is an Offence against the Court only, and amerceable by them. The Sheriff is not therefore considered as a *Trustee* for the Party ; nor, in this Case, for the Crown. There is no Difference between the Case of the Crown, and the Case of the Subject.

This was so before 4 Ann. c. 15. (which made Bail-Bonds assignable.) That Act made no Alteration : It does not oblige the Plaintiff to take an Assignment of the Bail-Bond. His Remedy still is, by moving for Issues. The Bail-Bond belongs to the Sheriff : He takes it for his own Indemnity.

Secondly—This Court can not *take Notice of a Trust.* And here, the Crown's Interest does not at all appear to the Court.

Mr. *Wallace*, contra, for the Defendants.

The Act of Parliament upon which this Action is founded, is 29 Eliz. c. 4. But the *Crown* is not within it. No Demand has ever been made upon the Crown, on that Act.

The Act of 3 G. 1. c. 15. gives Fees to Sheriffs, on Levies, &c.* But the Money must first be accounted for, in 26. 17. the Exchequer. The Crown therefore is not within the Act.

The Question here is, “ Whether this be the Suit of the Crown, or the Suit of a private Person.”

Now,

Now, it is, in Substance, the Suit of the Crown. And it is averred to be so.

The Plaintiff has his Election, either to accept of the Bail, or to proceed against the Sheriff by Amercement. *12 Mod.* 447. *Pickering's Case.* *1 Salk.* 99. *pl. 6.* *10 W.* 3. *Etherick versus Cowper.* *2 Salk.* 608. *Rex versus Dawes.* *Raymond* moved that further Amercement might be stayed; and that the Prosecutor might accept of the Bail Bond. And the Court held that They could not *oblige* the Plaintiff to accept the Bail-Bond. But here the Crown has elected to proceed against the Bail.

The Act of *4 Ann. c. 16.* does not extend to the King; nor does *23 H. 6. c. 10.* This is a Trust under *23 H. 6. c. 10.* And this is averred to be a Suit and Proceeding for the Benefit and on Account of the Crown: And "that the Plaintiff had Notice of this," is agreed by the Plea and Demurrer.

Therefore the Defendants ought not to be subject to this Payment.

Mr. *Ashurst*, in Reply—Acknowledged that the Crown was not named in the Act; and therefore not bound by it. But it would be a hard Case, he said, upon the Sheriff, if he was to lose his Poundage. And this is so far from having been thought reasonable, that the Act of *3 G. 1. c. 15. § 3.* gives the Sheriff *larger* Poundage in the Case of the Crown, than in the Case of a Subject.

As to any Admission made by our Demurring, the Answer is, that Nothing is admitted by a Demurrer, but what is well pleaded. And We demur, because we say "That the Facts pleaded do not warrant the Inference:" We say the Sheriff was *not* a Trustee for the Crown.

As to the Case of *Etherick versus Cowper* in *1 Salk.* 99.—It does not impeach my Doctrine; neither does *Dawes's Case* in *2 Salk.* 608 (which rather makes for me.)

As the Crown has not interfered, the Sheriff of *Herefordshire* ought not to be deprived of his Fees.

The Plaintiff's having had *Notice* "that the Crown was concerned in Interest," is not a Matter that We could have taken Issue upon.

THE

THE COURT agreed, that if the Crown be not named in an Act of Parliament, it is not bound by it. But, they were unanimous, That this could not, in any Light, be considered as the *Suit of the Crown*. The Bail-Bond was taken in the name of the Sheriffs: And it was their own Security. It was incumbent upon them to take good Security.

The Statute of 33 H. 8. c. 39. § 4. requires all Suits for the Recovery of any of the King's Debts, to be brought "in "the Name of the King only:" Whereas this is brought in the Name of the Sheriffs.

Per Cur'. unanimously—

Judgment for the Plaintiff.

Wednesday
26th Nov.
1766

Rex *versus* Inhabitants of Llandverras,

See this *Cafe at large*, in the Quarto-Edition of my SETTLEMENT-CASES. N^o. 184. p. 571.

Thursday²⁷ Sadler *versus* Evans: Or Lady Windsor's Cafe.
Nov. 1766

A Motion having been made, on Behalf of the Plaintiff to set aside a Non-Suit—

On the last Day of Easter Term last (1766,) Mr. Justice Aston reported from Mr. Baron Perrott who tried the Cause, That this was an Action for Money had and received to the Plaintiff's Use; and that the Counsel for the Plaintiff, who opened the Cause at the Trial, stated the Action to be brought with *Intention to try the RIGHT of Lady Windsor to a Quit-Rent of One Shilling, and to another Sum of Sixpence for Mises*. They stated, that the Defendant was her *Receiver*; and demanded them of the Plaintiff, *as such*. That, the Plaintiff paid the 1*s. 6d.* to the Defendant; and took a Receipt for them, by which, the Defendant acknowledged to have received them for the *Use of Lady Windsor*. That, in Fact, these Sums were *not due to Lady Windsor*; and that they were therefore received without any good Consideration; and consequently, that *this Action well lay against the Defendant into whose Hands they were paid*. And they were

were prepared with, and would have called Evidence to the RIGHT.

But the Judge (Mr. Baron Perrott) was of Opinion, that under these Circumstances, the *Action did not lie* against the Defendant. That Nothing could be more absurd than to make the *Collector or Receiver* of another Person liable to an Action for every Payment that was *voluntarily* made to Him ; and to leave Him to be defended, or deserted, by his Principal, as such Principal should think fit. That it was (in his Opinion) yet still more absurd, as He did not see how a Verdict given in this Cause could ever be received in Evidence for or against the Right which might in a future Cause come to be tried. That if this Action lay in such a Case as this, it would lie against every Attorney who by his Client's Direction should demand and receive Money as due to his Client, which the supposed Debtor might *voluntarily* pay, and afterwards think fit to dispute. He thought that if the One Shilling and Sixpence had been paid over to Lady Windsor, the Plaintiff might easily prove it : And, if it was not paid over, yet the Payment to her Receiver was Payment to Her ; And therefore the Action ought to have been brought against Her.

He therefore ordered the Plaintiff to be called ; remem-
bering the Case * of Mr. Kynaston's Collector ; against * The Name
whom the like Action was brought, to recover back a Cus- of this Case
tomary Payment for Tythes ; and the Plaintiff was non- was Stapple-
suited by Lord Chief Justice Lee, upon this Principle (as the field v.
Baron understood) " That the Right to an Inheritance Hugh, or
" should not be tried in an Action for Money had and re- Yewd, in
" ceived, brought against the Receiver or Collector." For, 1753, at Guildhall,
whether the Money had or had not been paid over to his
Principal, that could not be the Ground of Lord Chief Jus-
tice Lee's Opinion ; (as Mr. Baron Perrott thought) being a
Matter merely in the Knowledge of the Principal and Re-
ceiver : And to make the Action maintainable or not, just as
that Fact should appear on the Trial, would make this Kind
of Action a Trap for the Plaintiff.

The Baron acknowledged that He was the sole Occasion of the Non-suit ; and that it was against the Opinion of the Plaintiff's Counsel : And therefore he very candidly declared his Wish, that if He was wrong in his Opinion, the Non-suit might be set aside.

It was objected, on Behalf of the Defendant, " that a Non-suit could not be set aside."

Lord

* V. Lucas
315. S. C.
But it is only
an Account
of the first
Motion, in
P. 1 G. 1.

Lord MANSFIELD mentioned two Cases to shew,
 " that a Non suit may be set aside by the Court ;" viz.
*Temple versus Welds, M. 2 G. 1**. and *Bagshaw versus Wynn, Scacc. Tr. 13 G. 2. 1739.* He had no Apprehension, He said, that a Non suit might not be set aside, upon proper and sufficient Grounds, properly supported. And they must be very strong Cases that would alter his Opinion about it.

Mr. Serjeant Nares, of Counsel for the Defendant, there-
 + N.B. This upon cited some Cases to shew that it could not. *1 Barnes,* +
 Case is ex- *Love versus Day, pa. 226. M. 7 G. 2.* and *2 Barnes, Hartley als.*
 aetly S. P. *Green, versus Atkinson, pa. 255. M. 25 G. 2.*
 ple v.

Welds; though determined directly the Reverse. The latter Case, in *2 Barnes*, is thus—" Per Curiam : The standing Rule is, that if a Non-suit be regular, the Parties are out of Court, and it cannot be set aside."

Mr. Price, contra, (for the Plaintiff,) cited *Casely versus Evans. M. 29 G. 2. B. R.* where a Non-suit was set aside.
 [I do not find this Case amongst my Notes of that Term.]
 Adjourned.

THE COURT, on Thursday 12th June last, were unanimous, that upon the Facts stated in the Report, the Plaintiff ought not to recover against the Defendant, in this Action; and that the Action ought to have been brought against Lady Windsor Herself, and not against her Agent : And therefore they discharged the Rule for setting aside the Non suit. They thought, the Principles upon which Actions for Money had and received to the Plaintiff's Use are founded, did not apply to the Circumstances of the present Case. It is a liberal Action, founded upon large Principles of Equity, where the Defendant can not conscientiously hold the Money. The Defence is any Equity that will rebut the Action. This Money was paid to the known Agent of Lady W. He is liable to Her for it; whether He has actually paid it over to Her, or not : He received it for Her. And Lord Mansfield expressed a Dissent to the Case of *Jacob versus Allen, in 1 Salk. 27.* and his Approbation of *Pond versus Underwood, in 2 Ld. Raym 1210. 1211.* which is contrary to it. He said, He kept clear of all Payments to third Persons, but where 'tis to a known Agent : In which Case, the Action ought to be brought against the Principal, unless in Special cases, (as under Notice, or *Malá Fide.*) But They were unanimous, both upon Principles and Authorities, that where a Judge at *Nisi prius* non-suits the Plaintiff, and is mistaken; the Court upon Motion, may set aside the Non-suit.

RULE DISCHARGED.

In

In the following Term, *i.e.* on Thursday the 13th of this Month, another Question came before the Court, in the same Cause, but of a quite different Nature from the former; namely, "Whether, when a Cause remains untried, without any Fault in either Party, the Costs of this going down to Trial shall be paid by the unsuccessful Party to the Party finally succeeding in the Cause, (as the other Costs are;) or, Whether Each Party shall abide by his own Costs, occasioned without the Default of either."

Sir *Fetcher Norton*, on Behalf of the Plaintiff, moved that the Master might review his Taxation of Costs, in which he had allowed these Costs of the *Remanet*, as well as the Rest; and in the mean Time Proceedings to stay.

Sir *Fleetcher* stated, that a Writ of Error had been brought and *non pros'd*: So that the Record is now come back hither again, and his Objection is still open to the Plaintiff. The Court are still Masters of their own Record: Which would not have been the Case, if the Judgment had been affirmed both as to Debt and Costs.

His Objection to the Taxation was, that his Client ought not to be obliged to pay these Costs occasioned merely by the Cause having stood over at the first Assizes, as a *Remanet*, without his Client's Fault. A Cause going off upon a *Remanet*, ought (he said) to be excepted out of the general Rule.

Lord *MANSFIELD* seemed at first to think "That if neither Side were in Fault, neither Side should pay Costs." And this was made a *Remanet*, for Want of Time to try it.

But THE COURT and Master *OWEN* agreed to the general Rule "that Costs are to be paid, where the Cause goes off upon a *Remanet*; as well as any other Costs in the Cause;" and instanced in some *Maidstone* Causes, which went off for Want of Viewers; so that neither Party was in Fault.

Mr. *Serjeant Nares* and Mr. *Storw*e, on Behalf of the Defendant, now shewed Cause against the Master's reviewing his Taxation.

Their Writ of Error is *non-pros'd* at our Expence.

They come too late: They ought to have applied in Time. There has been Judgment of Discontinuance, so long as.

as a Twelve-month ago : And the Costs have been taxed, with this Allowance of the Costs as a *Remonet*.

The Court can not alter the Judgment now ; it being above a Term after Judgment was given. *Yelv.* 45. *Percival versus Spencer.* 1 *Bulst.* 49. *Hoblins versus Kinble.* Sir T. *Raym.* 38. *Ellison versus Ellison*—A Judgment can not be altered after the Term. *Cartbew* 167. *Chettle versus Lees.* 2 *Stra.* 1110. *Wray versus Lister*—The Court refused to permit the Plaintiff to remit Surplus-Damages ; because it was in another Term.

Sir Fletcher Norton and Mr. Price, *contra*, for the Plaintiff, argued in Support of the Rule for the Master to review his Taxation of Costs upon the Non-suit. They said, that on the Merits of the Case, it ought to be done. And the Plaintiff was, in all Respects ready to go on to Trial. This is a very hard Case : And the Plaintiff has had 90*l.* and upwards for One *Remonet*, and One Trial.

If a Cause goes off upon a *Remonet*, they agreed that the general Rule is “ that the Costs shall attend the Event of the Cause.” And they admitted, that in the Case of *Standen versus Hall*, P. 29 G. 2. B. R*. a general Rule was laid down. ^{*This Cause of Standen, versus Hall, P. 29 G. 2. B. R*} But every general Rule admits of Exceptions : And the present Case ought in Reason to be excepted; Wheatley, went

off upon a *Remonet* without any Default whatsoever in either Party : And it was argued, “ that where neither Party was in the Fault, neither ought to be punished in Costs.” But the Court thought it depended upon the Practice. And Master Clarke certifying “ that it was his Practice to allow them,” the Rule to shew Cause why he should not review his Taxation was discharged. And Mr. Justice Foster said it was the right Method.

I have also a Note of a prior Case, Price, ex Dimiss'. Cuthbert, v Birt, in Trin. 1742, 16 G. 2. B. R. where the Cause went off *pro Defectu Juratorum* : And the whole Court agreed “ that these Costs ought to be allowed as Part of the Costs of the Suit.”

Note. On the Crown Side, it is the Practice to allow them. In C. B. the Prothonotaries did not use to allow them : But, on the 7th July 1767, I was informed “ that the Court of C. B. had determined to come into the Practice of this Court for the future.”

As to coming in Time—Here was a Writ of Error depending : And We obtained a Conditional Rule, “ That upon quashing our own Writ of Error, we should have Liberty to set aside the Non-suit.”

As to the Cases cited from *Yelverton* and *Cartbew* and *Bulstrode*—They were Error upon the Face of the Record : And the Court would not amend.

This Case of Costs, (which are given by Statutes,) differs from Damages : And increased Costs are considered as a Penalty, *Cartbew* 179. *Coan versus Bowles*—Costs are *ficti juris*, “ and in the Nature of a Penalty.”

The

The Cases cited are upon *Damages*, (*not Costs*,) which are the Act of the Jury: But the increased Damages and the Costs are the Act of the Court; and the Court may rectify them at any Time. Here the Court (by their Officer) have given more Costs than they ought: And therefore the Court may now rectify it.

LORD MANSFIELD—On the Merits of this Question (“ What Costs ought here to have been allowed—”) I think that General Rules imply an Exception, in Cases where the general Rule is used for Oppression, or where the Hardship of the particular Case is such as that it would be manifestly unreasonable and unjust to include it within the general Rule; provided the Application is made *within due Time*. And if this had come *recently* before the Court, I should have thought that the Plaintiff ought *not* to pay the Costs of the *Remainder*. For, it appears that the Defendant treated the Cause as likely to be of great Length; though he intended to non-suit the Plaintiff, by an Objection which he kept in Reserve: And this put the Plaintiff to a great Expence. The Defendant likewise pretended “ that it was a great Damage “ to Him, that the Action was brought against Him, and “ not against Lady Windsor;” when, in Fact, Lady Windsor was the true Defendant, and at the whole Expence. So that it was a Snare laid, to prevent trying the Right. Therefore, I should have inclined, upon a recent Application, to have made this Case an Exception from the general Rule; allowing the general Rule to be right.

But the Application is now made a Year *after* a Judgment; and after a Writ of Error brought, and that Writ of Error *non pros'd.*

The Case cited by Mr. Stowe, of *Capiatur & Misericordia*, are not now Law. They have been cured, upon Account of their unreasonable Strictness.

If a manifest Miscomputation, or any plain Mistake in Figures should appear on the Face of the Record, with regard to Costs, I should think it might be amended: As (for instance) if the Damages had been said to be 60*l.* and the Costs 30*l.* which amount in the Whole to 100*l.*

But here is no such manifest Misrepresentation or Mistake on the Face of the Record. A proper Distinction has been made between the Damages given by the Jury, and the Costs. And they certainly come too late: For, *Vigilantibus, et non dormientibus, Jura subserviant*. Every Thing was in their Knowledge, from the first Moment: There is no new Discovery,

Discovery, nor new Ground. They should have complained during the Taxation, or in due Time afterwards ; or else have shewn that it was not in their Power to do so.

Therefore the Granting this Rule would be a bad Precedent ; though in a favourable Case. Favourable Cases make bad Precedents. Therefore, though I am sorry for the Hardship of the Case, yet I am not for granting the Rule.

The THREE Other JUDGES concurred that this was a favourable Case ; and if the Application had come in Time, they should have thought it reasonable to except it out of the general Rule.

Here, it is *substantially* altering the Judgment : *not* (as They observed) in a Matter of mere Mistake, but of *Judgment*. Therefore at such a Distance of Time, it would be very inconvenient to alter it : It might be a bad Precedent. And for that Reason, and *that only*, They were against granting the Rule.

Mr. Justice ASTON mentioned a Case from *Ireland*, of *Byrne versus Byrne*, which, He said, overturned all the Cases of *Misericordia*.

The Opinion of THE COURT was shortly this—

The THREE JUDGES agreed with Lord MANSFIELD, that though the general Rule still subsists—“ That the Costs of “ a Remand ought to attend the Event of the Cause ;” yet that and every general Rule must imply an Exception of particular Cases under such Circumstances as clearly distinguish them from being within the Reason and Principle of the general Rule. And they also concurred that this particular Case was One of those which ought to have been excepted out of the general Rule, if the Application had come in Time. But They were of Opinion with his Lordship, that in the present Case, the Plaintiff had by his own Negligence omitted the proper Opportunity ; and therefore had now no Title to Relief ; it being his own Fault, that he did not apply within due Time.

Per Cur^r. unanimously—

RULE DISCHARGED.

Rex

Rex *versus* Ann Brooke and Thomas Fladgate : Friday 28th
Or Ann Gregory's Case. Nov. 1766.

ANN E GREGORY, the Wife of *Abraham Gregory*, was brought up, upon the Return of a *Habeas Corpus* directed to her Mother and Uncle, which had issued at the Application of *Abraham Gregory* her Husband. She appeared to have been very ill used by her Husband ; and to have thereupon fled from Him, and came to the Defendants for Security and Protection : And she was ready to swear, and actually did swear the Peace against Him.

THE COURT would not order Her to be delivered to Her *Husband*, as his Counsel demanded : But on the contrary, told Her " She was at Liberty to go where she thought proper ;" and offered Her, and (at her Request) gave Her a Tipstaff to secure Her from any Insult in her Return to her Friends.

Rex *versus* Justices and Clerk of the Peace for the County of Derby.

*M*R. *Blackstone* and Mr. *Morton* shewed Cause, on Behalf of the Defendants, against a *Mandamus* to oblige them to register and certify a *Dissenting Meeting-House*, at *Melbourn* in that County.

See the Toleration-Act, 1 *W. & M. St. 1. c. 18. § 1. and § 19.*

1st Objection. *Non constat* what Species of Protestant *Dissenters* they are of ; nor in what Points they dissent.

2d Objection. *Non constat* that it is a House proper to be registered.

3d Objection. They have not brought themselves within the Qualifications of the Act.

See 1 *Lord Raym. 125. Green and fifteen Others versus Pope* ; where a *Mandamus* was issued upon this Act of Parliament, directed to the Bishop of *Chester's Register*, commanding Him to register the Certificate of a Place of Meeting of Protestant *Dissenters* ; And an Action was brought for a false Return to it.

Lord

Lord MANSFIELD—No Inconvenience can attend the registering this Meeting-House. The Registry and Certificate do not prove "that They are within the Act:" They will still be obliged to shew that They are within the requisite Qualifications, if called upon; notwithstanding the Register and Certificate. And if, in Fact, They are not within the Qualifications, the Justices may return "that they are not," if They think proper to do so.

Rule made absolute.

Barclay et Al'. Assignees of John Styles and Copeland Styles, Bankrupts, *versus* Hunt.

THE Question was "Whether the Defendant should be discharged on Common Bail upon an Objection to the Sufficiency of the Affidavit made by the Plaintiffs; to hold the Defendants to Special Bail."

The Assignees swore to the Debt in these Words—"As appears to these Deponents, by the last Examination of the Bankrupts; and as these Deponents verily believe." And they swore, that they themselves had not received the Debt or any Part of it; and that they believed it to be still due.

The Circumstances of this Case were these: *John* and *Copeland Styles* were Partners, and became Bankrupts. The Plaintiffs were Assignees under the Commission. This was a Debt due to the Bankrupts from *Hunt*; and was so declared by the Bankrupts upon their Examination, in the following Manner; viz. Their second Schedule includes a Debt due from "*Thomas Hunt*, by Balance of an Account 5800*l.*" And they swore that such second Schedule contained a true Account, to the best of their Remembrance and Belief."

John Staples resided in *England*: *Copeland* resided abroad, at *Bermudas*, and knew nothing of the Matter. *John*, who alone could swear to the Debt, refused to make Affidavit of it.

Yesterday, (27th November 1765,) Mr. Storwe shewed Cause on Behalf of the Plaintiffs, why the Defendant should not be discharged on Common Bail.

There are two Causes. One of them was brought in the Mayor's Court in *London*; and the Defendant has removed it by

by *Habeas Corpus*, into this Court. Therefore, by the Course of the Court, the Defendant must put in Bail here.

As to the other Cause, which is brought here, and in which this Affidavit is made;—It is the utmost that the Assignees can swear. The Bankrupts have refused to swear to the Debt. Hunt, the Defendant, is the Father-in-Law of the Bankrupts. Therefore the Assignees could go no further than they have done. There is a Case in 2 Barnes 65. *Tribe et al.* versus *Pratt*; where the Assignees only swore “that the Defendant was indebted to them 1300*l.* as appeared by an Account under the Bankrupt’s Hands:” And the Court thought a positive Affidavit of the Debt necessary; “Unless it had appeared, that the Bankrupt refused to make the same.” Here, he has refused.

He offered to accept the same Bail as the Defendant had already given to the Sheriff.

Sir Fletcher Norton and Mr. Dunning, contra, for the Defendant—

No Person was by Common Law liable to be arrested by his Body, on mesne Process. Therefore the Defendant ought not to be deprived of his Liberty, without Opportunity to defend Himself, unless by positive Affidavit. Therefore the Court have always required a precise positive Affidavit. It has never been relaxed, but in the Case of an Executor: In which Case, *No One else can* make such an Affidavit.

The not requiring Bail will not prevent the Plaintiffs having Justice. Perhaps requiring Bail has done more Harm than Good.

Here, the Bankrupts are both *alive*, and might swear to the Debt, if they should think proper. They refuse: Which may be, because They may know there is *no* Debt.

This Examination is only a Schedule of their Debts. They give up their All. But they may mistake. They only swear, even to that Account, “that it is a true Account, to the best of their Remembrance and Belief” But they can not perhaps be quite precise, as to all the Particulars of it.

Besides, as there are qualifying and restrictive Words in their Examination, *viz.* “to the best of their Remembrance and Belief,” an Affidavit so qualified and restricted would not have been sufficient to hold to Bail. Therefore this, even put all together, is *no Proof of a Debt*. The Stream
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can not flow *bigger* than the Fountain. the Affidavit can receive no additional Strength by the Reference to the Examination : For, the Examination referring the Remembrance and Belief to the *Whole* of it, refers them to *every Part* of it ; and consequently refers them to this particular Debt. Whereas the *biggest* Degree of Evidence ought to be produced : And here, the Bankrupts Themselves might be had. Therefore this Present Affidavit is only the *second Authority* ; not the *best*.

Barnes's Note, of *Tribe and Others against Pratt*, shews that the Bankrupts ought to make the Affidavit : It *can not* be supplied by *any other* Affidavit. It ought to be positive, because it can not be contradicted. And for the same Rea-

* The Reason *, it can not be bolstered up or supplied by a *second* Affidavit. We have an Affidavit " That the Bankrupt *can not* swear to this Debt :" He acknowledges that it is a Mistake *versus Goflin*, is "that Defendants may not be harassed."

Who could be indicted for Perjury, if this Affidavit should be false ? Not the *Maker* of it : Not the *Bankrupt*. Therefore No One can. Consequently, such an Affidavit ought not to be regarded, or have any Kind of Weight. It appears, therefore, upon the Whole of this Case, that no positive Debt is sworn to ; nor is there any Person that is indictable for Perjury, in Case that which is sworn, should prove to be false.

They cited the following Cases where the Defendants had been discharged on Common Bail. *Pasch.* 1754. 27 G. 2. *Fludyer, Assignee of Jackson*, *versus Greenwood and Hughes*, P. 18 G. 2. *Claphamson versus Bowman*, 2 Str. 1226. *Walron* *versus Fransham*, 2 Str. 1219. *Rios versus Belifante*, 2 Str. 1209. *Heathcote versus Goflin*, 2 Str. 1157. Tr. 23 G. 2. *Mill versus Fryer*. M. 26 G. 2. *Kelly versus Devreux*, B. R. and *Pomp versus Ludvigson*†. Mich. 23 G. 2. Vol. 2. p. 2. p. 655. where many of these Cases are collected together ; And also Vol. 2. p. 1032. *Maulby v. Richardson*.

THE COURT took Time till this Day, to look into the Cases.

CUR'. *advisare vult.*

Lord MANSFIELD now delivered the Opinion of the Court.

We are All clearly of Opinion, that the Affidavit is sufficient to hold the Defendant to Bail.

As to the Case of *Fludyer Assignee of Jackson*, versus *Hughes*, in 27 G. 2. cited by Mr. Dunning—He was misinformed. I have two Notes of it; One, taken by my Brother *Yates*; the Other, communicated to Me by my Brother *Aston*. According to the former, the Defendant was discharged on Common Bail; because the Affidavit only referred to the Bankrupt's Books, without adding that the Plaintiff believed it to be truer Mr. Justice *Aston's* Note of the same Case, is, that the Plaintiff made Affidavit “that the Defendant stood indebted, &c; as appears to Him by the Books of the Bankrupt.” The Defendant was discharged on Common Bail; the Affidavit being only by Way of Reference. And in the latter Note, it is mentioned, that two former Cases were cited; viz. * *Kelly* versus *Devereux*, * v. ante, and † *Walrond* versus *Franham*; Both of which were given 655. in Marup by Mr. *Pratt*, because the Affidavit was only by Way of fine, Reference. We have sent for that Affidavit: And it is thus † 2 Str. 1219.—“ That He was indebted &c, as appears by the Books and Ledger of J. J.”

It is manifest by a String of Cases †, that Words of Reference never are sufficient in an Affidavit to hold to Special Bail; such words (for Instance) as these, “ as appears by Books or Papers, or any Thing referred to”; or any other Words of mere Reference.

In the Case of || ——— versus *Vanderesk*, P. 3 G. 2. It || Qu. the was determined “ that in the Case of an Executor, if the Name of the Executor swears to the Books, and that He believes them to Plaintiff in contain a true Account, and that the Debt is still unpaid,” I have a it is sufficient to hold to Special Bail. Note of Eij. v. *Vanderesk*, in the very same Term; and another, in the next Term, of *Lucas v. Vanderesk*; but not to the same Point.

In the Case of *Maulby* versus *Richardson* §, Trin. 1760, § V. ante, swearing to the Debt, “ as the Plaintiff computes it,” was Vol. 2. allowed to be sufficient. p. 1032.

In the Case of *Holmes et al.* versus *Mendes Cesis et al.*. Trin. 1733. * 6 & 7 G. 2. the Plaintiffs were Assignees * This Case under the Commission of Bankruptcy, and swore that the Defendant was “ indebted to them in 60l. as appears by the Bankrupt's Books.” But the Assignees had not there sworn that They believed the Debt to be due. Which the Court took particular Notice of; and made the Rule absolute to discharge the Defendant on Common Bail. is not in Sir John Strange's Reports, though the Rule was made upon his motion

But, on the Reason of the Thing and the Authorities, the Defendant ought in the present Case to be holden to Bail; the

Affidavit being sufficiently positive, as the Case is circumstanced, to support a Demand of Special Bail.

The Court ought never to lay down a Rule to be construed so rigidly as that it may put unreasonable Difficulties upon the Suitors, and render them liable to Inconveniences worse than those which the Rule was intended to prevent.

As to what Sir Fletcher Norton said, "That Bills may have been paid after the last Examination"—If that were really the Fact, it would not save the Person who should swear in the evasive Manner that this Affidavit would, in such Case, be expressed, either from losing the Security of Bail, or from Criminal Prosecution: He might securely be indicted for Perjury, upon such an evasive Oath, as it would, upon that Supposition, be.

In Dr. Turlington's Case, He swore to the Sum due upon One Side of the Account only, without regarding the other Side of it. But that was a mere *Evasion*, and so treated.

So, in a Case from Plymouth, there was a like Manner of swearing; and it was considered as a gross Evasion: For, the *Balance* is the Point in Question; and neither Side of the Account can be taken by itself, without the other.

Therefore the Rule to shew Cause "why the Defendant should not be discharged on Common Bail," must be discharged.

RULE DISCHARGED.

Vide post. under Wednesday 3d February 1773,
Cravford versus Whittall, a Case very similar to
Fomp versus Ludwigson, ante 655.

Doe, on the Demise of Troughton, *versus Roe*.

A Material Rule was, this Day, made, in an Ejectment-Cause. A Judgment in the Ejectment had been regularly obtained by the Plaintiff, against the Casual Ejector, by Default: And the *Landlord* of the Premises had moved to set aside this Judgment; because his *Tenant* had not given Him Notice of his having been served with an Ejectment.

The Plaintiff, insisted, that his Judgment was perfectly regular; and that the Tenant's omitting to give his Landlord Notice of an Ejectment's being delivered, was a Matter merely between

between the Landlord and his Tenant, which could not affect the Plaintiff's regular Judgment fairly and duly obtained.

THE COURT were, however, clearly of Opinion, that the Possession ought not to be changed by a Judgment in Ejectment, where there had been no Trial or Opportunity of trying; though the obtaining the Judgment might be owing to the Default or even Treachery of the Defendant's own Tenant.

But, if the Plaintiff had not been guilty of any Collusion with the Tenant, they thought it reasonable that the Tenant, who was the Person guilty of the Default, should pay the Costs. For, the Rule of the Court which requires Service upon the Tenant in Possession, is calculated with a View that the Tenant *should give Notice* to his Landlord, in Order that the Ejectment-Cause may be tried between the proper Parties interested in the Question.

THE RULE was therefore enlarged; and an Order made upon the Tenant, to shew Cause why he should not pay the Costs.

Upon its now coming on again—

THE TENANT, by his Counsel, admitted himself to be in Fault; and submitted to the Court.

THE LANDLORD was an *Infant*; and therefore could not consent to the Trial of the Question, (which was Heirship,) in an *Issue*. But as Relief was *on his Behalf* prayed against a Judgment which was strictly *regular*, there could be no Doubt but that the Court might add such *Terms and Conditions* to such Relief, as were just and equitable, by bringing the real Question between the Plaintiff and Him, to be tried upon the *real Merits*.

THE COURT accordingly made the following Rule, *viz.*

Upon reading the last Rule, It is ordered that the Judgment signed in this Cause, and also the Writ of Possession issued and executed thereon, be set aside. And it is referred to Mr. Orvens, to tax the Lessor of the Plaintiff his Costs occasioned by the said Judgment and taking Possession as aforesaid, together with the Costs of this Application: Which Costs, when taxed, shall be paid by *Charles Douglas Bowden*, the Tenant in Possession of the Premises in Question. And it is further

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further ordered, that *Henry Reynell Spiller*, Esq. the Landlord of the said Tenant, be made Defendant, (as in the Conditional Rule;) and that he shall, upon the Trial of the Issue to be joined between the Parties, not set up any satisfied Term or any Trust-Estate, to defeat the Lessor of the Plaintiff; and also admit that *Zouch Troughton* was seised of the Premises in Question,

The End of *Michaelmas* Term 1766, 7 G. 3.

Hilary

Hilary Term

7 Geo. 3. B. R. 1767.

Rex *versus* The Corporation of Wells.

Monday

26th

January

1767.

ON shewing Cause against a Mandamus to be directed to them, commanding to restore *John Burland Esq.* One of His Majesty's Serjeants at Law, to the Reordership, from whence They had removed Him; it was agreed to abide by the Opinion of the Court upon the present Motion. The Facts appeared, on the Affidavits: They were, in Substance, to the Effect following—

His Tenure was “*quam diu se bene gererit.*” It was a Corporation by Prescription. The Times of holding their Sessions were sufficiently ascertained. The Causes or Grounds of Amotion were two: 1st. An improper Conduct at the Election of Members of Parliament on the 17th of December 1765; viz. Administering the Oath to One Mr. *Keate* as returning Officer, as well as to the Mayor, who (they said) was the proper returning Officer; and also refusing to suffer the Mayor to adjourn the Poll to the Assize-Hall; but continuing in Himself, together with *Keate*. 2dly. Repeated Non-Attendance. First, Refusing to attend at the last January Sessions, to be holden upon Munday the 13th, though Notice was given Him “to do so,” and likewise “that the Sessions could not be holden without Him; the Mayor being under a Necessity of being in London, and there being only One other Corporation-Justice.” And also neglecting to attend at the Quarter-Sessions on 7th April: At which He had indeed no particular personal Notice “to attend,” but nevertheless was obliged (as they insisted) by his Duty to have attended, as it was well ascertained to be the usual Day of holding this Session.

It appeared upon the Affidavits, that the Name of the Corporation is “*Mayor Masters and Burgesses:*” and that

Mr.

Mr. Keate was the senior Master, and claimed to preside at the Election of Members of Parliament.

It appeared that the Serjeant's general Residence was, and had for six or seven Years been in *London*; That He came down to *Wells* upon Occasion of this Election, in *December*; That the *January* Sessions happened whilst He continued there; That He did receive the Notice before mentioned; and that, in Fact, he did not attend at it; That he was summoned to appear, and shew Cause why He should not be removed from his Office of Recorder; And that at a Corporate Meeting holden at the Day therein appointed, He was removed.

His Defence was—That whilst He was resident at *Wells*, He was used to attend the Sessions: And since his residing in *London*, He has generally attended them about once a Year. That He now came to the Place as a *Voter* at the Election, and *not as a Justice of Peace, or Recorder*. That, as to the Sessions on *Monday 13th January*, He (being then in the Town) received Notice “That no Session could be holden “on that Day, by Reason of the Illness of Mr. Miller, another Justice, without whose Presence the said Sessions “could not be holden, the Mayor being gone to *London*.” That He nevertheless stayed in the Town, in order to attend: But Mr. Miller could not attend, still continuing ill. That, as to the Sessions of the *7th of April*—He was not then in the Town, nor had Notice of it: And that his Presence was not essentially necessary; there being a sufficient Number of Justices without Him, and their Jurisdiction confined to Contempts &c. and not extending to Felonies; and there being no particular Business ordinarily expected to come before Them.

It appeared, that Mr. Robert *Tudway* was Mayor of *Wells*; Mr. Keate, the senior Master; and Mr. Paris *Taylor*, Sheriff of *Somersetshire*. Mr. *Taylor*, the Sheriff, delivered the Precept to Mr. Keate: Mr. *Tudway*, the Mayor, demanded it; but Mr. Keate refused to deliver it.

Mr. *Tudway*, the Mayor, then ordered Serjeant *Burland*, as Recorder, to administer the Oath to Him (*Tudway*) as Returning Officer, and *not to Keate*.

Serjeant *Burland* said He would *disobey* that Order; and, upon his own Motion and Proposal, (as was alledged,) administered the Oath to *Keate*, as well as to the Mayor.

The Mayor thereupon adjourned the Poll to the Assize-Hall: But the Serjeant opposed such Adjournment; and advised

vised and assisted in continuing it where it was. In Consequence of which, Two distinct Polls were taken.

It was sworn, that Mr. Serjeant *Burland* acted there as Recorder; and many Proofs or supposed Proofs of it were specified.

Sir Fletcher Norton, Mr. Morton, Mr. Recorder Eyre, and Mr. Dunning, on Behalf of the Corporation, now showed Cause against the Mandamus to restore Serjeant *Burland* to the Office.

They urged two Charges against Him; viz. 1st. *Non-feasance*, or *Neglect* of Duty; and 2dly. *Malfeasance*, or *Misbehaviour*. And They laid down, as general Principles —That the Body at large have Power of Amotion; And that He is amoveable, for proper Reasons, though appointed to hold *quam diu se bene gerit*: And they insisted that these Matters charged upon Him are proper Reasons and sufficient Causes of Amotion.

First—As to the first Cause of Amotion—They admitted, that his Excuse seemed sufficient for the *January-Sessions*. But at the *April-Sessions*, it was his Duty to attend; though not a Charter-Day: For it was fully ascertained that the Sessions was usually holden on that Day. Therefore no Notice was necessary: But He must take Notice at his Peril.
9 Co. 50. a. le Countee de Salop's Case.

He owns that He was resident, when elected; and that for six or seven Years He has absented Himself, and lived in *London*. This wilful Withdrawing Himself is an Aggravation, rather than an Excuse. He ought to attend his Duty there: And the Non-Attendance is a Forfeiture. Serjeant *Whitaker's Case*, 2 Salk. 435. (third Point,) and 2 Ld. *Raym.* 1237. proves this.

Notice is not necessary, where the Day of holding the Sessions is known and notorious. Here, the Nature and Duty of his Office, and also his Oath of Office required his Attendance.

But even if it were necessary, the Serjeant has made it impracticable: He has withdrawn himself to *London*, out of the Reach of Notice, by a voluntary Absence.

This wilful Absence is itself a Cause of Amotion.

Secondly—The second Cause of Amotion is Mal-feasance.

He gave improper Advice, both to the Mayor and to Mr. *Keate*. His Conduct on the 17th of December 1765, was a direct

direct Breach of his Corporate Duty. It is not true, that He came only as a *Voter* : He came as Recorder. We have proved this : His *own Act* proves it ; for He could not administer the Oath, but as Recorder ; nor sign his Name to it, but as Recorder.

He did every Thing that, as a good Recorder, He ought not to have done. The Mayor was the sole returning Officer : And the Precept ought to have been delivered to *Him*, as it was directed. Instead of that, He opposed the Authority of the Mayor ; and incited, aided and assisted the Usurper of his Authority.

It was absurd, that the second in Office should preside, when the first was present and claimed to preside, and expressly required the Oath to be administered to Him and Him only. Yet the Serjeant called upon *Keate* to take the Oath, and officiously administered it to Him, as well as to the Mayor.

The Mayor thereupon adjourned the Poll to the Town-Hall. But the Serjeant advised and instigated *Keate* to proceed where He then was. In Consequence of this, two Polls were taken : The Serjeant, when He had read the Precept returned it to *Keate*.

Has not this Advice thrown the Town into Confusion ? And was it not done to serve a Party ? If it was Ignorance, it must have been *cassa Ignorantia*. It was Opposition to Government ; and like the Case of *The Protector*, and *The Town of Kingston upon Thames*, in *Style 477* ; where the Bailiffs adjourned the Court, and their Opponents stayed and acted, and made and entered Orders : And *Glyn Chief Justice* held it good Cause to disfranchise “ for entering of Orders “ made by a pretended Court, which in Truth was no “ Court.”

And they cited the Case of *The King against Mayor &c. of Newcastle* : where the Court refused a peremptory Mandamus to restore *Matthew Featherstonhaugh* ; as being *nugatory*, after he had totally deserted the Place, and resided in and near *London*. [This Case was determined on *Wednesday*, the 11th of *November 1747*.]

Mr. Serjeant *Davy*, *contra*, for the Recorder.

Lord MANSFIELD told Him, He had no Need to give himself any Trouble.

HIS LORDSHIP then expressed Himself to the following Effect.

Whether

Whether the Serjeant will *continue* Recorder of the Corporation, if restored; after all this that has passed, is for *his* Consideration: The Question before *Us*, is "Whether He " was *properly amoved*; and whether He ought to be restored " to his Office."

There is a Consent of all the Parties, to be determined by our Opinion on this Motion.

The two general Articles charged upon Him are His Behaviour at the Election; and his Non-Attendance at the April-Sessions. (For the Want of Attendance at the January-Sessions is candidly given up.)

The Charge of Misbehaviour at the Election is, shortly, his Administering the Oath both to *Keate* and the Mayor; though the Mayor commanded Him to administer it only to Himself. That the Mayor having adjourned the Poll, the Serjeant declared his Opinion, that the Mayor could not adjourn without the Consent of the Candidates; and that He continued with *Keate*, taking the Poll at the former Place.

I choose to take it in the Order in which the Corporation make the Charge: And They begin with his Conduct at the Election.

I dare say, That was the *principal* Ground of their amoving Him.

There is no Charge at all, of any *corrupt Motive* for his giving this Advice, or doubting of the Legality of the Mayor's presiding. And it is plain, that it was a sincere Opinion; because the Candidate whom He espoused, risqued the Fate of his Election upon it; and Those who voted for that Candidate, did not vote before the Mayor and *Keate* both, but only polled before *Keate*. Therefore, how erroneous soever his Advice might be, it was plainly his *real* Opinion.

He had Nothing to do at *that Meeting as Recorder*; nor was this a *Corporate Meeting*. It was a Borough by Prescription. The Mayor has the Return: He might have made it without the Recorder.

But, as Recorder, He is a *Justice of Peace*.

Has He then misbehaved as a *Justice of Peace*?

Two Persons claim the Return: And both demand to have the Oath administered. He administered it to Both: *Valeat quantum valere potest.* This, surely, was no Breach of Duty of his Office.

The Mayor adjourns the Poll. The Serjeant had nothing to do with the Adjournment, but as a *Voter*. He gives His Opinion. His Opinion was wrong. They who were His Friends, suffer by it. This is no Breach of his Corporate Duty.

As to his absenting Himself from the *April-Sessions*—All the Charge is, “ That He was *not present at it.*” He says, that whilst He was resident there, He did attend: And since his residing in *London*, He has generally attended about once a Year. That in *April*, two Justices were upon the Spot. That *no particular Notice* was given Him, to induce Him to go down: And that little or no Business occurred when He has attended.” And there is no Charge that there was any Business *then* to come before Them.

* V. ante,
Vol. i.
p. 532.

I know of no Case that says that the bare being *once* absent is a Forfeiture. And in this very Case, the Counsel for the Corporation allow an Excuse for his Absence in *January*. So that Absence *may* be excusable.

Indeed, a *general Neglect*, or Refusal to attend the Duty of such an Office, is a Reason of Forfeiture; a *determined Neglect*, a *wilful Refusal*. But a *single Instance* of omitting to attend, when no particular Business was expected, nor in Fact happened, is a very different Case.

I think the Law is well laid down by Serjeant *Hawkins* in treating of Offences by Officers, by Neglect or Breach of Duty. He says, “ It is certain that an Officer is liable to a Forfeiture of his Office, not only for doing a Thing directly contrary to the Design of it; but also for neglecting to attend his Duty at all usual proper and convenient Times and Places, whereby any Damage shall accrue to Those by or for whom He was made an Officer. And some have gone so far as to hold, That an Office concerning the Administration of Justice or the Common Wealth, shall be forfeited for a bare *Non-User*, whether any special Damage be occasioned thereby or not. But this Opinion doth not appear to be warranted by any Resolution in Point: and the Authorities which are cited to maintain it,

[†] See Haw-

kins's P. C.

Vol. i. c. 66.

§ 1. p. 167,

168.

He refers to several Books and Cases in his Margin; and agrees with those Authorities that say "That He who so far
 " neglects a public Office, as plainly to appear to take no
 " Manner of Care of it, should rather be immediately dis-
 " placed, than the Public be in Danger of suffering that Da-
 " mage, which cannot but be expected some Time or other
 " from his Negligence."

But No-BODY can say or even imagine, that *One single Absence* from a Session, at which Nothing of Importance was likely to happen, can amount to *such a Neglect* of a Recorder's Office, as to make Him plainly to appear to take *no Manner of Care* of it.

It is perfectly consistent with the Case of Serjeant *Whitaker*, as reported by Lord *Raymond* *, to say "That the bare * 2 Lord
 " being absent, is not a Cause of Forfeiture." That Case Raym. 12378
 was was an Amotion of Serjeant *Whitaker* from his Recor-
 dership of *Ipswich* for Non-Attendance (amongst other Cau-
 ses of Amotion) at two distinct Sessions of the Peace, Both
 appointed by Himself and at a Time too when He was (as it
 appears) present within the Borough. The Corporation there
 state (not a *single* Absence, but *two* different Neglects, at *two*
 distinct Sessions,) "that He and another Justice appointed a
 " Session to be holden on the 14th of *January* 1702, and
 " issued a Precept to return a Grand Jury &c; and that the
 " Session was proclaimed accordingly; and that He had *No-*
 " *tice* of all the Premisses; and All were ready; and that
 " He, *licet solemniter exactus, voluntarily and without any*
 " *reasonable Cause absented Himself.*" And They state *ano-*
 " *ther like Default on the 1st of April* following; only *muta-*
tis mutandis.

Then they state, in *hæc Verba*, the Notice they gave Him to appear and answer why He did not attend and assist: "You
 " knowing that by the Charters of this Town, no Sessions of
 " the Peace could be holden for this Town, *without the ac-*
"tual Presence of the Bailiffs and Recorder thereof."

Then when He attends, all the Reason He gives is "That
 " He *expected to have been sent for*, when they were ready." Plainly, therefore, He was *in the Town*: And it is as plain that He *wilfully and voluntarily neglected* to attend.

The Exceptions there taken to the Cause of Forfeiture so assigned in not attending to hold a Session of the Peace, were *only two*: 1st, "That a Session of the Peace might be hold-
 " en *without Him*, He not appearing to be of the *Quorum*;
 " and

" and two Justices of the Peace may hold a Session of the Peace. 2dly. Admitting it could not, yet 1st. They ought to have sent for Him; and 2dly. They ought to have shewn some *special Damage* to the Corporation by the not holding the Sessions."

'Tis to THESE two Exceptions only, that the Opinion of the Court is applied: And therefore it must be understood as qualified and restrained to the Subject then in Debate before Them. The Question was not "how many Non-Attendances of a Non-resident Recorder should amount to a Forfeiture"; but "whether his wilful absenting Himself ~~when~~ in the Town, was so."

It is not argued "whether His Presence was necessary to the Holding of the Session:" (though it appears upon the Return that it was.) But it was urged on the Part of Serjeant Whitaker, "that admitting it to be so, yet they ought to have sent for Him, and also they ought to have shewn some special Damage to the Corporation, by the not holding the Sessions."

The Corporation say, "That no particular Notice was necessary; and "that He ought to have attended this Session of his own Appointment, being in the Town."

The Opinion of the Court is, "That, admitting the Presence of the Recorder was not necessary, by the Charter, to the Holding a Sessions of the Peace, yet He must attend; For it was the Intent of the Charter in making such an Officer that He should assist the Corporation in Matters of Law: And the Justices of Peace, though They had Power, yet They might be afraid to proceed to the Holding of a Session without their Recorder. And secondly, this Office being a public Office concerning the Administration of Justice, the Officer is bound to attend at his Peril: And Non-Attendance is a Cause of Forfeiture of his Office, though no Inconvenience ensue by his Non-Attendance. And the Difference is between public and private Offices. And so is Co. Litt. 233. a. 9 Co. 50. Though, as the Chief Justice said, in this Case the Corporation might be disfranchised from neglecting to hold Sessions of the Peace; and so his Non-Attendance was a Damage to them."

There is no Doubt that Non-Attendance is a Cause of Forfeiture; But the Question is, "what Sort of Non-Attendance."

The Question in that Case of Ipswich was not "what Sort of Non-Attendance." Serjeant Whitaker appointed the

the Session, Himself; was actually then upon the Spot; and voluntarily and wilfully absented Himself.

A mere being absent once from attending a Session, without any particular Circumstance, is no Cause of Forfeiture.

In the Case now before Us, the Recorder resided in London, and had no particular Notice to come down to hold it. The Corporation have been satisfied with his former Absence: And He had no particular Reason to attend at this particular Time; And there was a sufficient Quorum upon the Spot. Therefore this was not a *craffa Negligentia*, sufficient to forfeit his Office.

I am warranted in the Opinion I have given, by the Case in 2 Roll. Abr. 155. Letter N. pl. 2. 3. "A negligent Escape is no Cause of Forfeiture of the Office of Marshal: But if He suffers several such Escapes, it lies in the Discretion of the Court, to oust Him."

As in that Case of the Office of Marshal, One Instance is not enough to amount to a Forfeiture of the Office; so here, a single Instance, under the Circumstances appearing upon the present Return, ought not, in Point of Law or Common Sense, to render this Officer of the Corporation liable to the Forfeiture of his Franchise.

Therefore I think the Mandamus ought to go.

Mr. Justice YATES was absent.

Mr. Justice ASTON and HEWITT were of the same Opinion of Lord MANSFIELD; and spoke to the same effect.

The Former said. He would only observe that here was (as it appeared to Him) no Cause of Amotion *pro mala gestura*, if it were granted that the Serjeant had acted as Recorder, at the Election: For, it was not a criminally erroneous Opinion that He gave, if it should be admitted to be erroneous.

And with regard to the Non-Attendance—The Charge was allowed to be sufficiently answered, as to the January-Session. And as to the April-Sessions—He saw no Cause of Amotion disclosed in these Affidavits; even upon the Rule laid down in 9 Co. 50. For, this is not such a Non-User or Non-Attendance as falls within that Rule: This is only *One single Instance*, unattended with any *One* aggravating Circumstance. And he mentioned a Case in 2 Salkeld 467. pl. 5. where the Court refused to grant a Rule against the Clerk of a County-Court for granting a Replevin without taking Surety

of the Plaintiff to prosecute; as it was a *single Instance*: They said, that when it grew into Practice, they would interpose: As if a Sheriff constantly or *frequently* used to let Persons at large without Bail, *then* it is an Abuse of his Office.

Per Cur'. unanimously—

RULE made ABSOLUTE.

Tuesday
27th
January
1767.

Rex *versus* Mayor, Bailiffs and Burgeesses of Cambridge.

ON Thursday the 27th of November last, Mr. Wedderburn shewed Cause against a Mandamus to be directed to the Corporation of Cambridge, commanding them to proceed to the Election of a Mayor, under the Statute of 11 G. 1. c. 4. § 2.

The Case was, That They had *in Fact* chosen One upon the 16th of August, which was the Charter-Day; namely, Mr. James Gifford, Junior, who was an Officer in the Army; just gone to North America, and *without* the least Probability of returning till long after the Year would be expired.

The Electors were sufficiently apprized of the Fact, at the Time of Election; and soon after it, had express Notice given Them of it: But they refused to go to a new Election.

* The Day appointed by the Charter for swearing the Mayor in, is the 29th of September yearly.

The RULE was then enlarged by Consent, on the Corporation's agreeing to be bound by the Opinion of the Court (if against them) without making any Return to the Mandamus. It was also consented to, that further Affidavits might be filed on both sides, within limited Times; within which limited Times, each Side should be respectively at Liberty to file them. And each Side was to have Inspection of the Books of the Corporation.

Mr. Thurlow, Mr. Aßburſt and Mr. Wedderburn now shewed Cause against the Mandamus.

They insisted that the Office was *full*: And that the Court would not interpose and displace an Officer, without his having any Notice.

They argued, that the Statute of 11 G. 1. c. 4. is out of the Case: Because here *has been* an Election: Whereas that Statute

Statute can take Place in those Cases only, where there has been no Election made upon the Charter or Usage-Day. It is neither impossible nor improbable that the Person elected may return within the Year: And He may be sworn at any Time. He has an Estate, a Freehold, in the Office; and has Himself a Right to a Mandamus to be sworn. Therefore the Court will send a Mandamus to go to a new Election of another Person into his Office.

By the Charter of 36 C. 2. and by Prescription also, the old Mayor is to hold over, till Another shall be chosen and sworn in: And that has been the Usage, Time immemorial. So that the Corporation is in no Danger of Dissolution. And though the Charter says, "That the Mayor shall be sworn in "upon a particular Day;" yet that is only directory: He may still be sworn, though the 29th of September be past.

Sir Fletcher Norton, Mr. Dunning, and Mr. Yorke, argued on the other Side, for the Mandamus.

We apply upon the Facts, UNDER the *Act of 11 G. 1. c. 4.* for a Mandamus to go to an Election, upon the Foot of there having been no due Election. The Words "No Election," in that Act, mean no due Election. The Case of *The Borough of Boffiny alias * Tintagel in Cornwall, 2 Str. 1003.**V. ante p. settles this Point
1453.1454.

The Election here pretended is merely colourable. The Electors knew that He was just gone to North America; and that there was no Chance of his returning within the Year. So that the Election was merely *elusory*, and calculated to enable the old Mayor to hold over: Which was the very Thing that the Statute of 9 Ann. c. 20. meant to prevent. And the 11 G. 1. must be coupled with that of Queen Anne.

They cited the Case of *Rex versus Mayor of Carmarthen, P.*†The Name 1755. 28 G. 2. which was a Mandamus granted, after an of the Case was *Rex v. Newsham and Others,*
de Facto.

Common Council-Men of Carmarthen. Lord Chief Justice Ryder delivered the Resolution of the Court, upon Monday 12th May 1755; Which was, "that a mere " de factio Election, which appears to be without Right, is not sufficient;" For, the Act means, "where no due, legal, valid Election has been made."

Suppose they had chosen a Person clearly incapacitated; would not the Court have issued a Mandamus? Now the Incapacity of this Gentleman is total, for the Time; though only temporary in Respect of Continuance. And if the Disability be total, the Court will grant a Mandamus to go

to a new Election. So they will, if they have good Reason to think the former Election void. *2 Str. 1157. Rex versus Burrough of Aberystwith.*

* V. ante, In Mr. * Scawen's Cafe, Port-Reeve of St. Michel, Mich. page 1453. 1753. 27 G. 2. the Court granted a Mandamus after a former Election.

Mr. Gifford indeed is not before the Court: Nor can He be so; because He is in *North-America*. But his Election was *void*: It was no Election at all.

They have not cited any Case on the other Side, to prove that the Court can not grant a Mandamus, where the Office was full.

[†]Mr. Justice THE COURT † were very clear, that a Mandamus Yates was ought to go.
not in Court.

Lord MANSFIELD said He had no Doubt on this Question.

The Acts of 9 Ann. c. 20. and 11 G. 1. c. 4: were made to obviate the Misbehaviour of Mayors.

The Corporation has a Right to a new annual Officer, every Year: And He ought to be *duly chosen*. The Court are to judge whether such an Officer be *duly chosen*, or not.

If an Officer is actually sworn in, They may perhaps think it proper that his Right should be tried first; or if the Electors be doubtful or questionable: But if they see † clear, that there is only a colourable Election, it is void; He has no estate in the Office; and the Court will not keep the Corporation without a Head, but will grant a Mandamus to go to Election.

Sir Fletcher Norton's two Cases of *Carmarthen* and *St. Michel* are very strong, if the present Case wanted Authorities.

The Ground of the present Application is, that there has been no Election.

This pretended Election is a mere Colour, to avoid any Election at all.

The Electors knew the Circumstances of this Person: They were apprized of the Whole, before the Election was concluded: They chose Him, because it was impossible for Him

Him to execute the Office. This is *no* Election at all: It is a mere Colour, a playing upon Words. “*An Election*” means a *due* Election. They were morally certain that He could not execute the Office, to which they chose Him.

Whether the last Mayor has a Right to hold over, seems a very doubtful Matter: It depends upon a surrendered Charter, never acted under since. So that this would involve the Corporation in fresh Difficulties.

The Corporation have a Right to an Officer: And the Court ought to grant this Mandamus.

The Person now pretended to be elected is incapable; and chosen because He was so: Nor can He be obliged to accept the Office, and a^t. It is a void Election. And as They knew of the Incapacity, their Votes were as no Votes: They were thrown away.

Mr. Justice YATES was absent.

Mr. Justice ASTON and Mr. Justice HEWITT were clearly of the same Opinion with Lord MANSFIELD, That a *mere de facto Election* is not sufficient to prevent the Court from issuing a Mandamus under the 11 G. 1. c. 4. which clearly means that “where no *due legal valid* Election has been “made upon the Charter or Usage-Day,” the Court may issue a Mandamus. And they were equally clear, that *this* was a *mere colourable* Election, an Elusion of the Act; a *void* Election, and as *no* Election at all; and consequently, that the Office was not full; nor had this Person any Estate in it: The Whole is a mere Contrivance to evade the Act, and to frustrate the Intention of both 11 G. 1. and the 9th of Queen Anne.

Therefore—*Per Cur’.* unanimously—

RULE made ABSOLUTE.

It was ordered to be directed “to the *late* Mayor” (without specifying his Name.)

Rex *versus* the Inhabitants of Shalfleet: Saturday
Sherrington’s Cafe. 3rd January

ON Wednesday 19th November last, Mr. Dunning moved to quash an Order of Sessions, which quashed a Rate of assiting John Sherrington to the Poor; and had a Rule to shew Cause.

The Question was, “ Whether an Officer of the Salt-Office is not liable to be rated to the Poor, in Respect of his Salary.”

The following Special Case was stated, upon the Officer’s appealing from the Rate—

J. S. the Appellant inhabits a Tenement in Shalfleet : And He is an Officer appointed by His Majesty’s Commissioners of the Salt-Office, for the Purpose of superintending the Salt-Works carried on in the Parish aforesaid ; for which He receives a Salary of 40*l. per Annum*, by Monthly Payments, from the Government : and is removable from his said Office by the Commissioners at Pleasure. That the Salt-Works which He superintends have been and are assessed, both to the Land-Tax and to the Poor ; and have constantly paid such Assessments. That the Officers appointed by the said Commissioners for the Purposes of superintending the Salt Works have been assessed to and have paid the Land-Tax : But it does not appear to this Court [the Court of Sessions] that such Officers have been before this Time rated to the Poor. That the said J. S. is rated to the Poor, the Sum of 3*l. 18*s.** upon the Account of his said *Salary only*. The Sessions, being of Opinion “ That the said John Sherrington is not rateable for his Salary,” doth quash the Rate : And it is, by their Order, quashed accordingly.

This Order of Sessions imports to have been made on the Appeal of the said J. S. an Inhabitant of Shalfleet in the Isle of Wight in the County of Southampton, Salt-Officer, from and against a Rate made for the Relief of the Poor of the said Parish, and confirmed by two Justices.

On Wednesday last (the 28th) Mr. Attorney-General (*De Grey*) and Mr. Thurlow shewed Cause, on Behalf of the Salt-Officer, why the Order of Sessions should not be quashed.

They chiefly insisted upon its being a Tax charged upon the Profits of the Man’s daily Labour ; and relied on the Construction of the Act of 43 Eliz. c. 2. § 1... This Charge is, by the Words of the Order, “ upon the Account of his Salary only.”

Assessments for the Relief of the Poor must be made according to the Person’s *visible Ability* within the Town or Place where He inhabits ; and without having Regard to any other Estate which He has in any other Town or Place.

In 2 Bulstr. 354, it was so holden by *Hutton* and *Croke* : And They declared it to be the Opinion of all the Judges of England,

England, on a Reference made to them, and upon a Conference together.

The *Land-Tax Acts* indeed expressly mention Offices and Salaries: Which distinguishes that Rate from this for the Relief of the *Poor*.

Quit-Rents and the Casual Profits of Manors are taxable to the *Land-Tax*; though not to the Poor. *Rex versus Vandewall**: And the Reason there given is, because they never* v. ante, were rated before. They cited the Case of *Chelsea-Hospital*†, p. 991. where the Usage was not to tax.

+ v. ante,
p. 1059 and
1064. S. C.
cited.

So here, the *Usage* has been, not to rate the Salt-Officers to the Poor, though they are rated to the Land-Tax.

A Man is rateable for no other personal Property than what He has in the Parish.

Sir Fletcher Norton and Mr. Dunning, *contra*—were for quashing the Order of Sessions.

They argued that He was rateable for his *Salary*, within the Words, as well as Meaning and Intention of the Statute of 43 Eliz. c. 2: Which, they said, had been always construed with Favour and Latitude, and extended very often far beyond the Words.

It is reasonable, that where Persons derive a Benefit from, They should submit to the Burthens of the Parish.

As to Usage—The Apartments in *Chelsea College* did not use to be rated to the Relief of the Poor: Yet they have been adjudged to be rateable. So that that Case is for Us; having been determined *contrary* to the former Usage.

Every Man is, for every Sort of personal Property which has a certain Produce, rateable to the Relief of the Poor of the Parish where he *lives*; not in the Parish where his personal Property *lies*. And this is a fixed, certain, permanent Produce, as to the *Value*: It is no otherwise casual or contingent, than in Respect of the Man's Continuance in his Office. If He ceases to be in Office, He will cease to be taxed.

These Salaries have been thought to be fit Objects of Taxation to the *Land-Tax*: and there is much stronger Reason why they should be so to the Poor. They are expressly named in the *Land-Tax Acts*. Which shews that they are fit Objects of Taxation in general.

* V. ante, In *Vanderwall's Case*, the * Resolution of the Court was
P. 993. not grounded upon *Usage* only.

† V. ante, In the Case of *St. Luke's Hospital* †, No rateable Object
P. 1053. was to be found.

As to 2 *Bulz.* 354.—The Counsel on the other Side apply the Words “Visible Estate he hath in the Town,” to the Thing : But they ought to be applied to the Person. And We say, that every Man is rateable, in the Parish where He lives, for all his visible Property, wherever it lies. Indeed an uncertain Fund is not rateable : As was resolved in the Case of
‡ V. ante, the Occupiers of Lead-Mines in *Cumberland*.
P. 134^r.

No Objection has been made to the *Quantum* of this Rate : The Objection is, “ That the Officer is not rateable.” If an Officer’s Salary should be extremely small, He ought not indeed, in Point of *Discretion*, to be rated : On the contrary, if it be a handsome Salary, He ought. But the present Question does not turn upon the *Quantum*, but upon the being rateable, or not being rateable, in Respect of Salary : Which is personal Estate within the Parish,

Lord MANSFIELD desired to think of it, for a Day or two ; and to look into the Acts. It is very extensive ; and a new Thought.

CUR' avisare vult.

HIS LORDSHIP now delivered the Opinion of the Court ; having first stated the Case.

He said He had no Doubt, upon the Argument : But as it was a Point of general Extent, He took Time to consider it.

This Man is rated for his *Salary only* ; for a specific Property bringing Him in a Monthly Sum of Money, for executing an Office determinable at Pleasure.

This Species of Property is not mentioned in the Act of 43 Eliz : Nor has it any Analogy to those Sorts of Property that are mentioned therein.

The whole Scope of the Argument against the Order of Sessions was foreign to the Question. It was, “ that a || On 9th Feb. 169. “ Man may be rated in his Parish for his || personal Es-
Rex v.
Guardians of the Poor of the City of Canterbury ; S. P. was discussed, but not de-
termined.

A Man's

A Man's personal Estate is only what He is worth after Payment of all his Debts : Which can not easily appear, so as to be rated. But *that* is not the Question here. He is here rated for this *specific Property*, as *lying in the Parish*: Which He ought not to have been.

We are ALL of Opinion, " that this is not such a Species of Property as can be rated to the Relief of the Poor, " as personal Estate within the Parish."

Therefore let the Order of Sessions be affirmed.

ORDER OF SESSIONS AFFIRMED.

Rex *versus* Inhabitants of St. Matthew's Bethnal Green. Tuesday 3d
Feb. 1767.

See this Case in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 185. p. 574.

Heathfield *versus* Chilton.

Thursday
5th Feb.
1767.

ON shewing Cause why the Defendant should not be discharged out of the Custody of the Marshal, (upon *Ann. c. 12.*) as a domestic Servant to *Paul Pierre Ruffel, MINISTER* * from the Prince Bishop of *Liege*—He swore *V, the next Himself to be *bonâ fide English Secretary* to Him ; and to Page, have been *bonâ fide hired* by Him, as such ; and to have *bonâ fide received Wages*, as they became due, at the rate of 30*l.* per *Annum*. Both the Minister Himself, and the Relation of this Man to Him, were objected to.

But *Chilton's* own Affidavit was positive, as to the Service ; and that it was real and not colourable : And it was confirmed by a Mr. *Chamberlayne*, who called Himself Secretary. He also swore that He was not an Object of the Bankrupt Laws. He had been House-Steward to Lord *Nortbington*. No Certificate was produced, under the Hand and Seal of the Minister ; though the Application was made (as the Attorney alledged) on the Part of the Minister : Nor was it sufficiently sworn, that the Defendant was in the Service of the Minister, at the TIME when he was arrested.

Lord

Lord MANSFIELD—The Privileges of public Ministers and their Retinue depend upon the Law of Nations ; which is *Part* of the Common Law of *England*. And the Act of Parliament of 7 Ann. c. 12. did not intend to alter, nor can alter the Law of Nations. His Lordship recited the History * of that Act ; and the Occasion of it ; and referred to the Annals of that Time. He said, there is not One al. v. Bath, of the Provisions in that Act, which is not warranted by the Vol. 3. p. Law of Nations.
1478.

The Law of Nations will be carried as far in *England*, as any where ; because the Crown can do no particular Favours, affecting the Rights of Suitors, in Compliment to public Ministers, or to satisfy their Points of Honour.

The Law of Nations, though it be liberal, yet does not give Protections to sereen Persons who are not *bonâ fide* Servants to public Ministers, but only make Use of that Preten-
tence, in Order to prevent their being liable to pay their just Debts.

The Law of Nations, does not take in Consuls, or Agents of Commerce ; though received as such, by the Courts to which They are employed. This was determined in *Bar-*

[†] See Mr. Forrester's Cases in Equity, Temp. Ld. Talbot, pa. 281. and ante, p. 1480, 1481. which was solemnly argued before and determined by Lord Talbot, on confidering and well-weighing *Barbeyrac*, *Binkershoek*, *Grotius*, *Wincquefort*, and all the foreign Authorities : For there is little said by our own Writers, on this Subject. In that Case several curious Ques-

tions were debated.

If I did not think there was enough in the present Case, from Lord Mansfield's own Note of it. already appearing to the Court, to enable Us to form an Opinion, I should desire to know in what Manner this Minister was accredited. Certainly, He is not an *Ambassador* ; which is the first Rank. *Envoy*, indeed, is a second Class : But He is not shewn to be even an Envoy. He is called “Minister,” ‘tis true : But *Minister* (alone) is an equivocal Term.

I find this is not an Application by the *Attorney General*, by the Direction and at the Expence of the Crown. That, indeed, would have shewn that the Crown thought this Person intitled to the Character of a public Minister. It now remains uncertain what his proper Character is.

But supposing him to be a Minister of such a Kind as intitles Him to Privilege ; yet I think this is not a Case of Privilege, by the Law of Nations : For, the Defendant does not appear to have been in the Service of the Minister, AT THE TIME of the Arrest.

A public Minister shall not take a Man from the Custody of the Law : Though the Process of the Law shall not take his menial Servant out of his Service.

Here, it is not sworn when the Defendant came into the N.B. There Service. And upon the Manner of swearing here used, the was what Court must take it, " That He was not in the Minister's was called " Service, at the Time of the Arrest." a supple-
mental affi-
davit : But

it was holden not to be now admissible; because it could not be answered,

Mr. Justice YATES was not in Court.

Mr. Justice ASTON concurred. The Rule laid down by Lord MANSFIELD is a very right One. The Process of the Law shall not, indeed, take a Person out of the Service of a public Minister : But, on the other Hand, a public Minister can not take a Person out of the Custody of the Law. If a Man has no such Privilege at the Time of his being arrested ; no subsequent Privilege can be given him, by being afterwards taken into the Service of a public Minister.

Therefore, as it does not appear here, that the Defendant was then in the Service, he can not be intitled to this Privilege.

This is a true and right Principle : And the Establishing it may prevent many of these Applications.

Mr. Justice HEWITT concurred ; and repeated and confirmed the Principle ; and agreed that it does not here appear that the Defendant was, at the Time of the Arrest, in the Service of this Minister.

Lord MANSFIELD took Occasion to observe, that the Registering the Name of the Defendant in the Secretary of State's Office, and transmitting it to the Sheriff's Office, (mentioned in the fifth Section *), re- provides lates only to the Bailiff who arrested Him ; and is no " that no Condition precedent to the being intitled to the Pri- " Person vilege of a public Minister's Servant. In this, Mr. " shall be Justice ASTON also concurred.

" arrested the Servant of an Ambassador or public Minister, by Virtue of this " Act ; unless the Name of such Servant be first registered &c."

Per CUR' unanimously †—

RULE DISCHARGED.

† Mr. J.
Yates was
absent.

Frederick,

Friday 6th
Feb. 1767.

Frederick, Bart. *versus* Lookup, qui tam &c.

THREE had been a long gaming Squabble between Sir Thomas Frederick and Mr. George Lookup. Some Account of the former Part of it, where Sir Thomas made the attack upon *Lookup*, may be seen in the third Volume, from page 1901 to page 1904. Afterwards *Lookup* took his Turn, and attacked Sir Thomas, by an Action in the Common Pleas, in the Name of his Brother, as a Common Informer, brought against Sir Thomas upon the 9 Ann. c. 14. *scz. 2.* for the Sum of 3150*l.* being 787*l.* 10*s.* Money won at Play by Sir Thomas at One Sitting, and 2362*l.* 10*s.* the treble Value of it: One Moiety whereof is, by that Act of Parliament, given to the Person suing; and the other Moiety, to the Poor of the Parish where the Offence was committed.

This Action was brought in the Common Pleas, in Michaelmas Term 3 G. 3 by Andrew *Lookup*, the Defendant in Error, as a Common Informer, against Sir Thomas Frederick, described as being late of Westminster in the County of Middlesex.

The Record in C. B. begins thus—(*Roll 305.*) Middlesex—to wit—Sir Thomas Frederick late of Westminster, in the said County Baronet was summoned to answer to Andrew *Lookup*, who sueth as well for Himself as for the Poor of the Parish of St. Paul Covent Garden in the County of Middlesex aforesaid, in a Plea that He render to the Poor of the Parish aforesaid and to the said Andrew who sues as aforesaid, the Sum of 3150*l.* which He owes to them, and unjustly detains &c. And whereupon the said Andrew who sueth as aforesaid, by S. B. his Attorney, saith that one George *Lookup*, after the 1st Day of May in the Year of our Lord 1711, to wit on the 11th Day of March in the Year of our Lord 1757, at Westminster aforesaid, by betting at Cards did lose to the said Sir Thomas at One and the same Time and Sitting, the Sum of 525*l.* and then and there paid the Sum of 525*l.* so lost as aforesaid to Him the said Sir Thomas the Winner thereof.

Then He shews that George *Lookup* did not prosecute with Effect, within the three Months: Whereby and by Force of the Statute * an Action accrued to Him, who sues as aforesaid, for the Poor of the said Parish and for Himself, for 2100*l.* Parcel of the said 3150*l.* that is to say, the aforesaid 525*l.* and treble the Value thereof.

Then

Then it goes on with a like Demand of 1050*l.* other Parcel of the said 3150*l.* being 262*l.* 10*s.* lost to Sir *Thomas* by one *James Hamilton*, and treble the Value thereof.

And alledges that Sir *Thomas* hath not paid the said 3150*l.* to the said *Andrew*, and to the Poor of the Parish aforesaid.

Plea—*Non debet*; And Issue joined thereon.

The Jury find that the said Sir *Thomas* doth owe to the Poor of the said Parish and to the said *Andrew* who as well &c. 945*l.* Parcel of the within mentioned Debt of 3150*l.* in Manner and Form as declared for in the second Count: *And they assess his Damages by Reason of the said 945*l.* being detained from the said Poor and from Him, besides his Costs and Charges, to one Shilling; and for his Costs and Charges, to forty Shillings.*

They further find that the said Sir *Thomas* doth not owe to the said Poor and to the said *Andrew* who as well &c. the Residue of the said 3150*l.*

JUDGMENT—It is considered, that the said *Andrew* who as well &c. and the said Poor of the Parish aforesaid, do recover against the said Sir *Thomas* the aforesaid Sum of 945*l.* which by the Jury aforesaid is above found to have been forfeited by Him the said Sir *Thomas*, by Force of the Statute aforesaid, Parcel of the said Sum of 3150*l.* And that the said *Andrew* who as well &c. have one Moiety thereof, to wit 472*l.* 10*s.* to his own proper Use; and that the said Poor have the other Moiety thereof to their own proper Use, according to the Form of the Statute aforesaid.

It is also considered, that the said *Andrew* who as well &c. do recover against the said Sir *Thomas* his Damages aforesaid, to forty one shillings by the Jury aforesaid in form aforesaid assessed; and also 55*l.* 19*s.* to the said *Andrew* who as well &c. at his Request, for his Costs and Charges aforesaid, by the Court here, for the Increase adjudged: Which Damages, in the Whole, amount to 58*l.*

And the said Sir *Thomas* in Mercy &c. And the said *Andrew* who as well &c. in Mercy, for the false Complaint against the aforesaid Sir *Thomas* for the Residue of the aforesaid 3150*l.* whereof the said Sir *Thomas* is above acquitted: And that the aforesaid Sir *Thomas* go thereof without Day &c.

The Errors assigned are—That in the Record and Proceedings, and also in giving Judgment there is Error; in this, That the Declaration in the Record mentioned is not sufficient in Law to maintain the Action: And that it appears by the Record, that the Judgment was given for the Plaintiff the said *Andrew* who as well &c.; when it ought to have been given for the Defendant Sir *Thomas Frederick*.

Joinder in Error—

Several Objections were made by the Plaintiff in Error, to this Judgment.

1st. That it does not appear that the Parish of *St. Paul's Covent Garden* had any Sort of Right to this Money. It is not shewn nor alledged, that the Offence was committed in that Parish: It is laid to be “*at Westminster* aforesaid,” without specifying any Parish at all.

2d. It is a *wrong Venue*: Which is fatal in a penal Action.

3d. The Poor have here Judgment to recover, (“the said *Andrew* and the said Poor;”) whereas the Act directs that the *Informer* shall recover.

4th. The Judgment is for *Damages* to the Common Informer, and also *increased Costs*. Whereas a Common Informer can't have Damages for the *Detention* of the Debt. *1 Ro. Abr.*, 574. Letter *P. pl. 1. and pl. 4.* express. And the Costs *de incremento* are connected with these Damages. And this is an *entire Judgment*; and must be either affirmed *in toto*, or reversed *in toto*: It is not like distinct Judgments.

It was answered—

1st. This is *after Verdict*. It must have been proved at the Trial, “that the Offence was committed in the Parish of “*St. Paul's Covent Garden*:” For, the Jury have found “that Sir *Thomas* doth owe to the Poor of that Parish.” *Sir Thos. Raym. 487.* *Hitchins versus Stevens* lays down the Rule “that wheresoever it may be presumed that any Thing “must of necessity be given in Evidence, the Want of men-“tioning it in the Record will not vitiate it after a Verdict.” And this Rule extends to Actions upon penal Statutes. *Hobart 78. St. John against St. John:* And *Carteau 304. Alston et al. versus Buscough*. The Court will intend it, *V. 2 Ld. Raym. 1214. Tyson versus Piske*. It is only a Title

Title defectively set forth. There is Nothing upon the Record contrary to it. The *Venue* is laid in *Westminster* aforesaid; which, by Reference, appears to be in the *County of Middlesex*: And *St. Paul's Covent Garden* is known to be in *Westminster* in the County of *Middlesex*. Besides, if it were admitted to be wrong, it would be cured, they said, by the Statutes of *Jeofailes*. 3 *Lev.* 374. *Sedgwick, qui tam &c.* *versus Richardson.* *Bendoe* 37. *Keilway* 207.

2d. By 24 G. 2 c 18. § 3. Every *Venire facias* for the Trial of any Issue in any Action or Information upon any penal Statute in any Court of Record at *Westminster* &c, shall be awarded of the *Body* of the County where such Issue is triable. So that the Restriction of 4 & 5 Ann. c. 16. § 6. (which expressly provided "that that Act should not extend " to Actions or Informations upon penal Statutes,") is now taken off; and that Act is now extended to Actions and Informations upon Penal Statutes. And the Action is clearly brought in the proper County. The Sheriff can return no other than the general Pannel. *French, qui tam, versus Wilshire,* 2 *Stra.* 1085.

3d. It may be either Way. 2 *Hawkins's P. C.* pa. 266. *se^z.* 20. is very full to this Point, and cites many Cases. It was necessary to mention the Poor of the Parish, in the Declaration. It is not necessary to name even the King: There is a Precedent in long * *Quinto of Edw.* 4. of a Declaration in the Name of the Informer only, without mentioning the King. And if the Poor need not be named, it can't be necessary to shew that the Offence was committed in the Parish. The Statute of 9 Ann. c. 14. § 2. impowers any Person to sue for and recover the Money; and then directs that a Moiety of it shall be "to the Use of the Poor of the Parish where the Offence shall be committed." Therefore the Declaration may be laid, either "to render to the Informer only:" or, "to render to the Informer and the Poor:" And, consequently, so may the Judgment be likewise.

4th. The Counsel for the Defendant in Error acknowledged that a Common Informer can't have Judgment for Damages for the Detention of the Debt; because the Debt itself don't arise till the Judgment: And the increased Costs will follow the Damages. But they denied that this was an entire Judgment, and must be reversed *in toto*, if at all. On 934. Lam. the contrary they are distinct Judgments, ("It is considered &c." "It is also considered") So that Part may be affirmed; and the other Part, which is affected by this Objection, may be reversed. *Bellew versus Aylmer.* 1 *Stra.* 138. *Henriques versus The Dutch West India Company.* 2 *Stra.* 807.

*Mr. Justice Yates was not present. THE COURT, being satisfied with the Answers given to the Objections, affirmed the former Part of the Judgment; and reversed the latter.

RULE—Upon hearing Counsel for both Parties, IT IS ORDERED, that so much of the Judgment as relates to the Recovery of the Debt in this Action, be affirmed; and that so much of the said Judgment as relates to the Damages and Costs, be reversed.

Rex *versus* Nathaniel Dawes :

† V. Ante.

(One of the † Winchelsea Causes.)

^{† This Rule had been enlarged from} **O**N shewing Cause why an Information in Nature of a *Quo Warranto* should not be granted against the Defendant Dawes, who had been nineteen Years and an half in And the like quiet Possession; to shew by what Authority He claimed to be One of the Freemen of Winchelsea—The two Objections Rule had made to Him were Non-Residence, and not paying Scot and bearing Lot.

^{Time,} against Richard Wardroper, and also against Thomas Marten.

THE COURT unanimously concurred in Opinion, that it was contrary to the true Spirit and Meaning of the Statute of 9 Queen Anne, c. 20. “ for rendering the Proceedings upon Writs of Mandamus and Informations in Nature of a *Quo Warranto* more speedy and effectual; and for the more easy trying and determining the Rights of Offices and Franchises in Corporations and Boroughs,” to grant Informations almost of Course; as had been the Practice till of late Years. They held that the true intent of the Legislature in making this Statute, was, that the Court should exercise a sound Discretion according to the particular Circumstances of the respective Cases on which Applications were made to them for granting such Informations: And that it was by no means meant, that they should be granted of Course.

The Act was made for the Quieting of Corporations, not for throwing them into Disorder and Confusion. The Legislature were far from intending to encourage Attacks upon Persons who had been long in quiet unmolested undisputed Possession of Corporate Rights; though They have not explicitly fixed the exact Line of Limitation. But as They have left the granting or refusing these Informations in the Discretion of the Court, to be guided by such particular Circumstances

cumstances as shall be laid before Them, it is very proper for the Court to draw such a Line, in order to forward the Intent of the Legislature. If the Court should be thought to fix it either too extensive or too narrow, it will always be in the Power of the Legislature to alter it.

In this View, the Court have already drawn such a Line, and fixed upon twenty Years as a proper Limitation of *Quo Warranto* Informations; beyond which Limit of quiet undisturbed unmolested undisputed Possession of Corporate Franchises, They will not listen to any Application of this Kind, to disturb such quiet Possession: But the quiet Possession alone, for twenty Years, shall be a flat Answer to the Application; and the Court will refuse the Information, upon what Circumstances soever the Application may be grounded.

Yet still, notwithstanding this Limitation to twenty Years, a great Length of quiet Possession, though somewhat short of this fixed Limit of twenty Years, may and ought to be taken into Consideration by the Court, as One of the Circumstances which may deserve to have its due Weight in guiding their Discretion. Many Opportunities of Defence, many Proofs of Facts tending to Defence, may be lost; many Circumstances may be forgotten or not capable of being made out, after a long undisputed quiet Possession; many Witnesses may be dead or not to be found, after setting up such a stale Prosecution, which might have been easily re-collected proved or produced, if the Prosecution had been commenced within a recent and reasonable Time.

And They declared their Inclination to lay down and establish as many certain general Rules as They could, in Cases of this Sort; in order to settle the Peace of Corporations, and prevent Litigations so inconvenient to Corporators and Corporations.

* RULE DISCHARGED.

* But Note.—This Case was taken up again, the next Morning; and was then adjourned over. The Rule was taken in these Words—“ The Court will consider whether the Rule made Yesterday, to discharge a Rule *nisi*, for an Information against Nathaniel Dawes, shall stand, or not.”

And on the following Tuesday (the 10th of February,) the following Rule was made.—Ordered that the sixth Day of next Term be given to Nathaniel Dawes, to shew Cause why an Information in Nature of a *Quo Warranto* should not be exhibited against him, to shew

shew by what Authority he claimeth to be one of the Freemen &c. (*ut supra*:) With Liberty for either Party to lay before this Court Affidavits with Regard to the Consequences to the Corporation, in Case of granting an Information. *Rex versus Tho. Marten.* The like Rule. *V. post. p. 2120.* 8th July 1767.

Saturday 7th
Feb. 1767:

Rex versus Richard Wardroper :

*V. ante,

(Another of the *Winchelsea Causes.)

SIR Fletcher Norton, on Behalf of the Defendant, against whom Non-Residence was objected, but not sufficiently proved; and whose Possession did but little exceed $\frac{1}{2}$ Six Years; argued very strongly against the Line of Limitation having been drawn by the Court, so extensively as to reach to $\frac{1}{2}$ Twenty Years: For, that it was extremely clear to Him, that the Statute of 9 Queen Anne intended to confine Applications for Informations in Nature of a *Quo Warranto* to a very RECENT Time of Prosecution. It obliges the Relator to proceed expeditiously, after it is out of the Hands of the Court; and can it be supposed (especially considering the general Scope of that Statute,) that it did not mean to confine the first Application to the Court, to a recent and short Time? The Legislature could not mean, that the Court should ever grant them upon *sale* Prosecutions; whatever the Circumstances might be. He laid it down, by Analogy from other Limitations of Actions, that confining the Prosecution to six, four, or two Years would be much more reasonable, than allowing any greater Number, much less twenty Years.

[†] He was elected on 13th May 1760: The Affidavit was sworn on the 4th of Nov. 1766. The original Motion was made in Michaelmas Term 1766.
[‡] See the last Case.

And He declared that this was his Sentiment at the Time when the Court established this Limitation of twenty Years; but did not think it decent at that time, to express his Disapprobation of it.

But Lord MANSFIELD said, the COURT had settled this to be the Line; and No-body made any Objection to it at the Time when They declared it: Therefore, it was now too late to object to it.

The Counsel for the Prosecution denied that the Act of 9 Ann. c. 20. had any Sort of View to limiting the Time of commencing a Prosecution of an Information of this Kind: For which, They appealed to the Statute itself.

Lord

Lord MANSFIELD declared his Desire to establish Certainty, in Corporation-Causes.

He did not, in this Case, go upon Length of Time, but upon the *Facts sworn*; which amounted, as He thought, to a Proof of Residence. He expressly declared that He did not, in *this* Case, go upon the Length of Time, as a Bar: through Length of Time, even under Twenty Years, may in *some* Cases have its due Weight as one Circumstance joined to others.

Mr. Justice ASTON declared the same.—This does not turn upon *that* Rule; but upon the Circumstances of the Case: It appears, upon the Whole, that He *was resident* at the Time when He was elected.

In the Case of *Rex versus Milbourne*, P. 6 G. 3.—He had enjoyed the Franchise ten Years. But that alone was not holden to be a sufficient Reason to refuse the Rule.

These People who swear for the Prosecutor, lay by, without recently prosecuting, though with a full Knowledge of the Fact: Which is a Reason against admitting their Complaint now first taken up, to be the Ground of our granting an Information. In the Case of *Rex versus Lewis* *, Capi- * V. ante, tal Burges and Alderman of *New Radnor*, the Court gave Vol. 2. Costs against the Prosecutor; because he Himself knew the P. 780. Complaint to be groundless.

Mr. Justice HEWITT held also that here was sufficient Satisfaction given to the Court, of this Man's Residence. And the Court may, without any Impropriety, take Notice of the Conduct of the Persons making the Affidavits upon which the Application is grounded.

He thought that the Statute of 9 Ann. c. 20. does, upon the Whole, shew a Legislative Intention to prevent Confusion in Corporations, and an Apprehension of Inconveniences attending stale Prosecutions; though the enacting Part does not indeed contain any explicit Limitation of Time for commencing the Prosecution.

Pet Cur'. unanimously—

RULE DISCHARGED.

Thursday 12
Feb. 1767.

Rex *versus* Edward Cator.

THE Defendant had been convicted upon 5 G. 1. c. 27. and 23 G. 2. c. 13. of enticing and seducing Artificers in the Manufactures of this Kingdom into foreign Service.

Both Acts are upon the same Subject. His Offence was within both Acts. The Artificer seduced was a Coach Spring Maker.

Lord MANSFIELD—The latter Act seems to a Repeal of the Former : It was made, to supply the Deficiencies of the former.

N. B. The Penalty, for the first Offence, was by the former 100*l.* and three Months Imprisonment : By the latter 500*l.* and twelve Months Imprisonment. For the second Offence, by the former, Fine at Discretion, and twelve Months Imprisonment in the County-Gaol : And by the latter 1000*l.* and two Years Imprisonment.

Vide Rex versus Medcalfe, 4th July 1750 : Where the Defendant was convicted (by Confession) upon One single Information, of having solicited four different Artificers : And the Court held that they could inflict but One Punishment; it being but One Information. That was a Conviction on 5 G. 1. c. 27. Also *Rex versus Josam Knight*, twice ; first, on 28th May 1753 ; and again, on 2d July 1754 : Both, on the same former Act of 5 G. 1. c. 27. In all these three Cases the Fine was 100*l.*

Mr. Justice ASTON observed—That by the latter Act, there is no Discretion left in the Court : The Punishment directed in it, is *peremptory*. The former Act directs the Fine for the first Offence, to be in “ any Sum not exceeding “ 100*l.*”

The SENTENCE in the Case now before the Court, was—To pay a Fine of 500*l.* and to be imprisoned in the County-Gaol * of the County of Middlesex for twelve Calendar Months, and until the Fine be paid.

*V. 23 G. 2.
c. 13. § 1.

Pope et Ux'. *versus* Redfearne, Un'. &c.

A Rule had been made, upon the Application of the Defendant, who was an Attorney, for the Plaintiffs to shew Cause "Why the *Venue* should not be changed from "the County of York, where it is now laid; and be laid in "the County of Middlesex." And the Question was "Whether an Attorney has a Privilege of changing the "Venue into Middlesex, where he is DEFENDANT in the "Cause."

Here was an Affidavit, that this Defendant resided in Yorkshire.

Mr. Wallace, on Behalf of the Plaintiffs, now shewed Cause against the Rule. He cited and relied upon the Case of *Cooper versus Mills*, an Attorney, M. 10 G. 2. C. B. Barnes's Notes, Vol. I. p. 344. Title "*Venue*:" Where that Court determined, "that an Attorney being DEFENDANT "hath no such Privilege."

Mr. Barnes, contra, for the Defendant, (the Attorney,) cited and relied upon the Case of *Wigley versus Morgan*, Un. &c. in 2 *Strange* 1049. *Trin.* 10 G. 2. 1736. B. R. where the Question was "Whether in an Action against an Attorney, he had Privilege to change the *Venue* into Middlesex; "as well as to lay it there, when he is Plaintiff;" And the Court held, "there was no Difference."

Mr. Justice ASTON observed, that in the printed Rules of * this Court, (published in 1740,) that Resolution * See this in 2 *Str.* is inserted; and in the same Term, *Trin.* 1736: Collection and it was looked upon as settled, at that Time. But the (in Folio) of Case of *Bisse versus Harcourt*, P. 2 *W. & M.* (in 3 *Mod.* 280. the Rules and *Carthew* 126.) denies any such Privilege, where he is Notices in Defendant: And it appears from the Case cited out of this Court, Barnes's Notes, that the Court of Common Pleas did de- p. ult. Note "termine so, likewise," in *Mich.* 10 G. 2. (e.) "If a "Barrister, "Attorney

"or Officer of the Court, be Plaintiff, and the Action be laid in Middlesex, the "Court will not change the *Venue*: And if any such Person be a DEFENDANT, and "sued in any other County than in Middlesex; the Court will, on motion, ALTER "the *Venue* to Middlesex. But where they sue or are sued in *autre droit*, as Executors &c, or jointly with other Persons, then they lose their Privilege."

I think, the Resolution in *Bisse versus Harcourt* is the most rational Determination: And the Court of Common Pleas follow it still.

There is no Necessity for an Attorney to go down into the Country to attend a Cause where He is Defendant.

Lord MANSFIELD—The Case of *Bisse versus Harcourt* is the most rational Determination : And the Court of Common Pleas follow it.

Mr. Justice HEWITT—They do so.

Per Cur'. unanimously—

RULE DISCHARGED.

Though this Question is now (it may be hoped) finally settled, yet it may perhaps amuse the Reader's Curiosity, to lay before Him some intermediate Cases upon the same Question, which I find amongst my own Notes, subsequent to that of *Bisse* and *Harcourt*, but prior to the present Case, and which gradually lead to it.

The first of them was in *Hil. 1731. 5 G. 2. B. R. Bishop versus Burgess* : Where the *Venue* was changed to *Middlesex*, because the Defendant was an Attorney ; though he lived in the Country, and never attended *Westminster-Hall*.

The next was an Action upon the Case, brought by *Wigley versus Morgan*, an Attorney ; reported (very shortly) in *Strange 1049* : Of which I have a full Note. Mr. *Lacey* had moved, on the Behalf of the Defendant, to change the *Venue* from *Surry* to *Middlesex* ; and obtained a Rule to shew Cause. On shewing Cause, He argued for the Attorney, the Defendant : Mr. *Vaughan*, for the Plaintiff. Mr. *Lacey* (besides the Cases mentioned by Sir *John Strange*) cited the abovementioned Case of *Bishop versus Burgess* ; and also a Case in *C. B. Hil. 5 G. 2. Hickes versus Foot* : Where an Action brought against a Barrister was laid in *Cornwall* ; and the *Venue* was changed into *Middlesex*, though the Barrister could not practise at the Common Pleas Bar. He likewise cited *Bobun's Institutio legalis 263* to prove “ that an “ Attorney may choose whether he will sue or be sued, “ out of *Middlesex*.” He argued that the Reason why the Attorney has this Privilege arises from his being obliged to attend *Westminster-Hall* : And that Reason holds equally strong, where he is Defendant,

as where he is Plaintiff. And though in *Brome's Case*, 1 *Keble* 277. and in that of *Thompson versus Sir William Scroggs*, in 2 *Shower* 176. and in that of *Seaman versus Ling*, in 2 *Salk.* 668. and in *Hickes versus Foot*, the Defendants were *Barristers*, yet *Attorneys* are included within the *Reasons* of those Resolutions: And *Wilcocks's Case* (mentioned in the *Case of Seaman versus Ling*) was the *Case* of an *Attorney*; and is in Point. Mr. *Vaughan*, on the other Side (for the Plaintiff,) cited a *Case* of *Lacker versus Harcourt*, in *P. 2 W. & M.* " Case against the Defendant; laid in *Somersetshire*. Sir *Bartholomew Shower* Himself moved to change the *Venue* upon " Account of the Defendant's Privilege as an Attorney and Clerk in Court, and to have it laid in *Middlesex*; and shewed several Rules wherein it had been done, (as for Mr. *Rathurst*;) and urged the Practice for it, and the Reason of that Practice, *viz.* their supposed constant Attendance on the Court here. But DENIED by Chief Justice *Holt*, et ceteros tacentes: For that they have no such Privilege." Lord *Hardwicke* (at that Time Chief Justice) happened to be absent. The Other three Judges made the Rule absolute, for changing the *Venue* from *Surry* to *Middlesex*. Mr. Justice *Page* mentioned a *Case* of Mr. *Knight*, Clerk of the *Affize* for the *Norfolk Circuit*, who laid his Action in *Middlesex*, though the Cause of Action arose in *Kent*; and the *Venue* was changed, upon the common *Affidavit*: But, upon Mr. *Knight's Motion*, that Rule was set aside, and the *Venue* brought back again to *Middlesex*. (See 2 *Salk.* 670. *Knight versus Farnaby et al.* (S. C.) Now the *Case* of an *Attorney* is stronger than that of a Clerk of *Affize*: For an *Attorney* ought to attend at *Westminster-Hall* always: whereas the Clerk of *Affize* is only bound to attend there to return the *Poſteas*. And there is no Doubt about Counsel's having such a Privilege. Yet an *Attorney* is more obliged to attend, than a Counsel. Mr. Justice *PROBYN* said, it was admitted, in all the Books " that a *Barrister* is within that Privilege; because *Westminster-Hall* is the principal Place of a *Barrister's Attendance*." Now the Reason holds the same, for *Attorneys*: And two of Mr. *Lacey's Cases* support this; *viz.* *Bishop versus Burgess*, and *Seaman versus Ling*, in 2 *Salk.* 668. And the Reason of the Thing is the same, where the *Attorney* is *Defendant*, as where he is Plaintiff. Mr. Justice *LEE* said He found no Difference between the Privilege of a *Barrister*, and the Privilege of an *Attorney*, as to this Matter, where they are Plaintiffs: Nor did he find any Determination to the Contrary.

trary, where they are DEFENDANTS, excepting that Case of *Lacker versus Harcourt*, in 1 *Showe* 148. and the same Case in *Cartew* 126. But the Cases have since been determined otherwise; particularly, that mentioned in 2 *Salk.* 668. and that of *Bishop versus Burgess*. And it appears, from 2 *Venbris* 47. (in the Common Pleas,) "that where an Attorney is Plaintiff, he has Privilege to lay his Venue in Middlesex, because of his Attendance there." And in the Case of *Knight versus Farnaby et al.* 2 *Salk.* 670. the Rule is laid down, "that Barristers &c. who are to attend at *Westminster*, have therefore the Liberty of laying their Actions in Middlesex, when Plaintiffs." [I find, amongst my own MSS, two Cases to this Effect. One, in H. 5 G. 1. B. R. *Collins versus Altham*—"The Venue shall not be changed from Middlesex, where a Counsel or an Attorney is Plaintiff." The other, in P. 8 G. 1. 1722. *B. R. Forrest versus Charworth*. The Court refused to change the Venue from Middlesex, upon the common Affidavit; because the Plaintiff being an Attorney, was obliged to attend the Court there.]

Note—That although the Case of *Lacker versus Harcourt*, reported in 1 *Showe* 148 is supposed by Mr. Justice Lee to be the same Case with *Bisse versus Harcourt*, reported in *Cartew* 126. yet it does not appear with absolute Certainty, "that it is the same." It is true, that they are Both reported as of the same Term: And the State of each Case is like the Other. Nevertheless, there are some small Differences. Sir *Bartholomew Showe* says, He shewed several Rules where it had been done; and specifies Mr. *Bathurst's* Case: But it was denied, he says, by Chief Justice *Holt*, *et ceteros tacentes*. Whereas *Cartew* mentions *Andrew Loder's* Case, as that in which the Rule was produced, and to whom the Privilege was allowed: And according to his Report, the Rest of the Court were not silent; for he rehearses a Case which Mr. Justice *Dolben* cited. Indeed Both agree that the Court denied the Motion, because *Harcourt* was the DEFENDANT: And Both agree "that an Attorney, or Officer of the Court, where he is DEFENDANT, hath no Privilege concerning the Venue." Upon the Whole, I conjecture "that they were different Actions, but the same Question:" Which I collect from *Cartew's* speaking of the Actions in the plural Number:—"Because *Harcourt* was the Defendant in those Actions."

The

The next Case, in Point of Time, to *Wigley versus Morgan*, was *Holliday versus Burgeys*, P. 1739, 12 G. 2. B. R. It was an Action on the Case upon a Promissory Note, brought against an Attorney. Mr. Yorke moved on his Behalf, to change the *Venue* from *London* to *Middlesex*. LEE (now become Chief Justice) mentioned the two above mentioned Cases of *Bishop versus Burgeys*, and *Wigley versus Morgan*; and said, that though there had been a Difference of Opinion, it was then settled, “that where the Defendant is an Attorney, the *Venue* may at his Desire, be changed into *Middlesex*.” Page, Probyn, and Chapple, Justices, agreed with the Chief: And they said, it had been holden, “that where an Attorney, being Plaintiff, lays his Action in *Middlesex*, the *Venue* shall not be changed.” Lord Chief Justice LEE concluded with saying—“Take a Rule: They may move to set it aside if they will.”

The next Case to this last was *Wilson versus Evans*, Un. &c. Hil. 1759. 32 G. 2. B. R. Mr. Price had obtained a Rule to shew Cause why the *Venue* should not be changed from *Yorkshire* to *Middlesex*; the Defendant being an Attorney, and sued as Such. Mr. Luke Robinson shewed Cause: And denied that an Attorney, being Defendant, had such Privilege. Mr. Justice DENISON said, there were Determinations both Ways. Lord MANSFIELD doubted whether the DEFENDANT, though he was an Attorney, had any Right to bring back the *Venue* into *Middlesex*, when the Plaintiff, (who has a Right to lay his transitory Action where he pleases,) has laid it elsewhere. Where an Attorney is Plaintiff, it is indeed settled “that He has a Privelege to lay his *Venue* in *Middlesex*:” But it is not so well settled “that he can bring it back thither, when he is Defendant.” In this Case, the Attorney is DEFENDANT: So that it differs from the Cases where an Attorney is Plaintiff. It was, indeed, holden in the Case of *Wigley* and *Morgan*, “that there was no Difference between an Attorney’s being Defendant, and his being Plaintiff.” But in Lord Chief Justice HOLT’s Time in Mr. Harcourt’s Case, there was a solemn Determination the other Way: And, I believe, the Court of Common Pleas determine the same Way now. Therefore it ought to be looked into. The Rule was (accordingly) enlarged. Of this last Case (of *Wilson versus Evans*) I find no further Note: And therefore I suppose that it never came on again.

But

But the same Question was revived in *Hilary Term 1760*, 33 G. 2. B. R. in a Case of *Tattersall versus Hill*, an Attorney; upon a Motion of Mr. Wheeler's (on Behalf of the Defendant) to change the *Venue* from *Worcestershire* to *Middlesex*; who cited *Wigley versus Morgan*, and *Wilcocks's Case*, as in Point. But Mr. Justice Denison answered, "that there were other Books to "the contrary." And Lord MANSFIELD said, it had been *doubted*, since He came into this Court, in a Case of *Wilson and Evans*, Mr. Coopier (Clerk of the Rules) informed the Court "that that Case had never been determined." Whereupon, the Court gave Mr. Wheeler a Rule to shew Cause. But I believe it ended there: For I never heard any more of the Matter.

Theyer versus Eastwick.

ON Saturday the 24th of January, Mr. Dunning moved for a Prohibition to a Consistory Court of London, in a Cause of Defamation, for calling the Plaintiff Whore, in London.

Two anonymous Cases in *Ventr. 343* and *352.* are in Point.

It was triable at *Common Law*; being punishable in *London*, at *Common Law*, by the *Custom of London*.

Lord MANSFIELD doubted, whether the Court could

* They can judicially take * Notice of this Custom of London.
not Argil v.

Hunt, Tr. 5 G. 1. B. Driver et Ux'. v. Colgate, Hil. 12 G. 2. B. R. Hartopp v. Hoare, P. 16 G. 2. B. R.

But the Suggestion not being drawn up, it was ADJOURNED.

On the Wednesday following (28th January) this Motion having been renewed—

Mr. Justice ASTON said—It must be upon *Affidavit* of the *Custom of London*; and "that the Words were spoken
† It was so there.†"
helden in

Hynes v. Thompson, Mich, 12 G. 2 B. R. and in the abovementioned Case of Driver et Ux. v. Colgate.

A Rule was then granted, upon filing such an Affidavit. Which Rule was now made absolute.

Mr.

Hilary Term 7 Geo. 3. B. R.

2033

Mr. Justice ASTON said—It may be as well tried at Law, as in the Spiritual Court.

Per Cur'.—(Lord MANSFIELD absent—)

RULE made ABSOLUTE.

V. post. p. 2035. Buggin versus Bennett, concerning the Necessity of an Affidavit to ground a Motion for a Prohibition.

The End of Hilary Term 1767, 7 G. 3.

Easter

Easter Term

7 Geo. 3. B. R. 1767.

Fowler *versus* Dunn.

Thursday
7th May
1767.

THE Recorder of London had moved, Yesterday, for a *Habeas Corpus* to bring up the Body of the Defendant, who stood convicted of Felony, and was upon the Point of Transportation, in Order to be surrendered by his Bail in a Civil Action.

There was, at first, a Difficulty with the Court, "whether this could be done AFTER Conviction for a Felony, and Sentence of Transportation." But, at length, They granted the Motion; the Recorder alledging that there was a Precedent in Sir John Strange's Reports*. See 2 Str. 1217. Case of Peter Vergen.

N. B. There was a Doubt also with Master Owen, "whether there should not be a *Habeas Corpus* on the Civil Side;" But He was afterwards satisfied that it must be on the Crown Side.

It now appeared that the Man was actually *on Board* a Ship in the River, for Transportation; and that the Ship was ready to sail.

Lord MANSFIELD said that this made a very great Difference in the Case. For, under these Circumstances, it might be extremely inconvenient: They might as well pray a *Habeas Corpus* to bring Him hither, even after actual Transportation; for the King's Writ will run into the Colonies.

Therefore THE COURT, under these Circumstances, refused to grant the Motion.

Nothing taken by the MOTION.

Buggin

Buggin *versus* Bennett.Saturday
9th May

THIS was a Question concerning a Prohibition to the Court of Admiralty, to stay Proceedings there in a Suit for Seamen's Wages.

The Ship was destroyed at *Bencoolen*, by Order of the Governor, to prevent her falling into the Hands of the Enemy. The Master of Her agreed "that if the Mariners would " assist in unloading the Goods, they should be paid their " Wages."

It appeared upon the Proceedings in the Admiralty Court, "that it was covenanted and agreed &c." But it was not expressly alledged to be by *Deed*. The Articles were set out at full Length. They were annexed to the Plea, and referred to by it; and the *Locus Sigilli* was marked (L S): And it was prayed "that they might be taken as Part of the Plea." And the Defendant in the Admiralty alledged that it was covenanted "and agreed by them, that &c. &c." Proceedings went on there, till Sentence was given for the Mariners. After Sentence, and not before, the Defendant below moved this Court for a Prohibition; suggesting "that it was a "Contract by *Deed*, made at Land." The other Side admitted the Execution of the Articles to have been at *Gravesend*.

Mr. Serjeant *Burland* now shewed Cause against the Prohibition. He said that the Defendant below had not pleaded this *Deed* there; but has pleaded another Matter and submitted to the Admiralty Jurisdiction: And there is a Sentence against Him. He comes too late, therefore, AFTER Sentence.

AFTER Sentence, the Court will not grant a Prohibition, unless a Defect of Jurisdiction appears upon the Face of the Libel. *Winch*, 8. 1 *Ventr.* 343. 1 *Strange*, 187. *Argyle versus Hunt*; and *Symes versus Symes*, (*V. ante*, vol. 2. p. 813.) in *Trin.* 1759.

These Articles are not alledged to be under Seal; only, "that they were in Writing." Therefore no Defect of Jurisdiction appears.

These Seamen were entitled to their Wages: And they shall be indulged in proceeding in the Admiralty. The Sentence there was given upon the Merits. Great Delay Protraction and Expence would be occasioned to them, by the other Side's lying by thus long, and submitting to the Admiralty-Jurisdiction;

Jurisdiction ; if they could now at last object to it. This late Application is only for *Vexation* ; or calculated to save Costs.

Besides, if their Suggestion was better founded than it is, yet here is no AFFIDAVIT to verify the Truth of the Suggestion.

The Counsel on the other Side (Sir Fletcher Norton, Mr. Dunning, and Mr. Davenport,) relied on the Case of *Howe Esq. versus Nappier**, adjudged in last Michaelmas Term.
* Vante, p. 1944.

That was an Application pending the Suit, indeed : And this is after Sentence. But that Case was fully argued and discussed : And it was settled, " that the Admiralty have no Jurisdiction, where the Agreement is Special, or by Deed under Seal." And this appears to be a Contract made at Land, by Deed under Seal. For, the Articles are set out at full Length ; the *Locus Sigilli* is specifically marked out ; they are incorporated with the Answer ; it is alledged to be covenanted by them, so and so ; and the Execution of them at Gravesend, (which Execution must have been by Sealing,) is admitted. From whence it follows, that the Admiralty-Court had no Jurisdiction to proceed at all ; And consequently, their Proceedings were *coram non Judice*, and therefore void.

And, as this Want of Jurisdiction appears upon the Face of the Proceedings below, We do not come too late.

If this Court see that an inferior Court has proceeded *coram non Judice*, they will, in such Case, prohibit them in any Stage of the Cause, be it before or after Sentence.

Here, the Court of Admiralty never had any Jurisdiction : And the Consent or Acquiescence of the Parties can not give them a Jurisdiction in an Original Cause, if they really have none.

It is the Province of this Court, to see that Inferior Jurisdictions keep within their proper Bounds.

They denied that there was any Need of an *Affidavit* to verify the Truth of the Suggestion. They alledged that no other Affidavit is requisite, in the first Instance of applying for a Prohibition, than an Affidavit to verify the Proceedings below, and " that the Copy of them is a true Copy."

THE COURT did not agree to this last Assertion—They rather thought, that where the Want of Jurisdiction does not appear upon the Face of the Proceedings, an *Affidavit* was necessary.

Lord MANSFIELD—If it appears upon the *Face of the Proceedings*, “that the Court below have no Jurisdiction” *on* a Prohibition may issue at *any Time*, either before or after Sentence: Because All is a Nullity; it is *coram non Judice*.

But where it does *not* appear upon the Face of the Proceedings, if the Defendant below will *lie by*, and suffer that Court to go on, under an *apparent Jurisdiction*, (as upon a Contract made at Sea,) it would be unreasonable that this Party who when Defendant below has thus lain by, and concealed from the Court below, a *collateral Matter*, should come hither *after Sentence* against him there, and suggest that *collateral Matter* as a Cause of Prohibition, and obtain a Prohibition upon it, *after all this Acquiescence in the Jurisdiction of the Court below*.

Now here is Nothing upon the *Face of these Proceedings*, which shews, that the Admiralty-Court acted *without Jurisdiction*; or, that what they did was *coram non Judice*. The Word “*covenanted*,” alone, is not sufficient to that Purpose: That Expression does not *necessarily import* “that it *was a Contract by Deed*.”

In the Case of *Howe versus Nappier*, the Application for a Prohibition was *before Sentence*: This is *after Sentence*, and upon Suggestion, of a *collateral Matter*.

In that Case, no Objection was taken (as well as I can recollect) to the Want of an *Affidavit*. And where the Want of Jurisdiction appears upon the Face of the Proceedings, an Affidavit is not necessary; though every Suggestion that does not appear upon the Face of the Proceedings, but is *collateral* and *out of the Proceedings*, ought to be verified by *Affidavit*.

In the Case now before Us, the Matter suggested does *not* appear upon the Face of the Proceedings: but is *collateral*, and *out of them*: And therefore it ought to be verified by *Affidavit*.

Mr. Justice YATES thought the present Case to differ very much from that of *Howe versus Nappier*. In that Case, the *Deed was relied upon*, in the Admiralty-Court; and the Prohibition was applied for, *before Sentence*: And He said, the Court was satisfied, that they were right in the Determination of that Case. But in the present Case, the Matter suggested was not shewn or urged or relied upon as an Objection to the Jurisdiction of the Court of Admiralty; nor does it appear upon the Face of the Proceedings, “that the *“ Articles were made at Land, or under Seal.”*”

If the Want of Jurisdiction appears upon the *Face* of the Proceedings, there indeed a Prohibition may go at any Time: It is indifferent whether it be applied for before or after Sentence. The Reason is, because All is a mere Nullity.

If a Prohibition is applied for, the Ground of such Application ought to appear to the Court applied to. If the Want of Jurisdiction *appears* to the Court, there is no Need of an Affidavit to verify it: But if the Matter suggested as a Ground of Prohibition does *not* appear upon the Face of the Proceedings, there must be an *Affidavit* to verify the Truth of it.

Mr. Justice ASTON—The Matter now suggested as a Ground of Prohibition was not made Use of as an Objection below, to oust the Admiralty of Jurisdiction. It should have been tendered to them, as a Plea, to oust them of their Jurisdiction. They had no Notice that there was any Objection to their Jurisdiction. Therefore, even *before* Sentence, it would not be decent to grant a Prohibition, when no such Plea had been tendered to them: Much less, *after* Sentence.

As to an *Affidavit* to verify the Truth of the Suggestion—it is not necessary, where the Defect of Jurisdiction appears upon the *Face* of the Proceedings: But where it arises from Matter *dehors*, then there *must* be an Affidavit.

A Suit for Mariners Wages may be brought in the Admiralty. To which Purpose, he cited a Case in 3 Lev. 60. *Coke versus Grettbet &c.* and another like Case, of *Middleton versus Scally* (mentioned at the End of it;) in both which Cases a Prohibition was denied: “For Mariners “Wages grow due to them for Labour done at Sea; and “the Charter and Contract at Land is only to *ascertain* “them.” And of this Opinion was *Hale* also; as *North* Chief Justice said, (in the former of these two Cases,) upon Conference with Him at the Desire of the Court of Common Pleas.

The Word “*covenanted*” is only used as a *Description* of the Contract: It does not, of itself alone, shew that it was by *Deed*.

Mr. Justice HEWITT—This Case *admits* the Determination in the Case of *Howe versus Nappier*: It does not thwart it at all.

If the Defect of Jurisdiction appears upon the *Face* of the Proceedings, the Whole is a NULLITY: Therefore the Suggestion

Suggestion needs not be verified by *Affidavit*. But you cannot avail yourself of an Objection *debors*, without an *Affidavit*.

This Case now before Us is an *unfavourable* Case : The Party has *lain by*, and *not objected* to the Proceedings below.

The Word “*covenanted*” is not, of itself alone, certain enough to shew it to be a *Deed*, so as to oust a Court of Jurisdiction. Therefore it does *not appear* upon the *Face* of the Proceedings “that they wanted Jurisdiction.”

It is reasonable to move, before Sentence, for a Prohibition, upon *Affidavit* of the Truth of the Suggestion, where the Fact suggested is not pleaded. And that was the Case of *Howe and Nappier*. But here they have acquiesced till after Sentence ; and no Defect of Jurisdiction appears upon the Face of the Proceedings. We may therefore *refuse* this Prohibition *consistently* with the Resolution of the Case of *Howe versus Nappier*.

Here Sir Fletcher Norton urged that want of Jurisdiction *does appear* upon the *Face* of the Proceedings. For, it *does* appear upon the Allegation, “that it *was* a Contract by “*Deed*.” And the Articles are *annexed*, and referred to ; and ‘tis prayed that they may be taken as Part of the Plea.

THE COURT answered Him, that this Allegation with its Reference, makes no Difference : It *does not prove* “that the Contract *was by Deed*.” Every Matter *debors* must, after Sentence, be verified by *Affidavit*. Why did they not *rely* upon this Objection below ? Why did they lie by, and *acquiesce*, till after Sentence ?

PROHIBITION DENIED ; and RULE DISCHARGED.

On the Monday following, Mr. Justice ASTON informed the Court and the Bar, that, He had, since Saturday, found two Cases relating to the Necessity of an *Affidavit* being produced, in Order to ground a Motion for a Prohibition ; viz. *Hynes versus Thompson*, Michaelmas 1738. 12 G. 2. (the next Term) in *B. R.*

In the former Case, Mr. Denison shewed Cause against a Prohibition to the Ecclesiastical Court of the Bishop of Bristol, to stay a Suit there, for calling a Woman “Whore,” in Bristol. He objected, that the Suggestion, which was “that there is a Custom in Bristol, (like the Custom in London,) that the Words, if spoken there, are actionable ; “and that the Party is corporally punishable there &c ; and “that the Words *were spoken in Bristol* ;” was *not verified* by *Affidavit*, as it ought to have been. He also objected, that

that this Matter ought to have been *pledged* below : Which was not even suggested. Lord Chief Justice LEE said, He did not see that any Thing was verified. And thereupon, the *According Rule was discharged *.

to my own

Note of this Case, there was a Suggestion of the *Custom*; but no Affidavit " that " the Words were *spoke in Bristol.*"

I have Notes of both these Cases, agreeable to the Account here given of them.

In the latter Case of *Driver versus Colgate*, Mr. Robinson moved for a Prohibition to the Consistory Court of London, to stay a Suit there, for calling a Woman " Whore," in London; because though there was an Affidavit " that the Words " were spoken in London;" yet the Custom was only suggested, but NOT pleaded. The Court held, that the Custom must be either verified by *Affidavit*, or pleaded : But a Suggestion alone was NOT sufficient.

In the former Case of *Hynes versus Thompson*, Lord Chief Justice LEE laid down the Rule to be—" That if you move " for a Prohibition, upon any Thing not appearing upon the " Face of the Proceedings, you ought to have an *Affidavit* " of the Truth of the Suggestion." And he cited *Godfrey versus Llewellyn*, 2 *Salk.* 549. in Point; and 2 *Salk.* 551. *Pl.* 13. Where HOLT Chief Justice laid down the Law to be, " That wherever the Matter which you suggest for a " Prohibition, is foreign to the Libel, you must plead it be- " low, before you can have a Prohibition : Otherwise, " where the Cause of Prohibition appears upon the Libel." And Lord Chief Justice LEE said, in that Case of *Hynes versus Thompson*, that He thought it must either be pleaded " that there was such a Custom," or an *Affidavit* of it. And Mr. Justice Chapple hinted that Prohibitions had been too easily granted : And was of Opinion that there ought to be an *Affidavit* to verify the Suggestion.

In the latter Case of *Driver versus Colgate*, the Court held that there was no Necessity to plead it below, in Cases of Prohibitions for *Words* spoken where they are by the Custom actionable, as there is in Case of a Prohibition on Suggestion of a *Modus*. For, in the former Case, they can not go on, if the Suggestion be true : But in the latter of a *Modus*—If the Modus be admitted in the Spiritual Court, they may go on ; because the Jurisdiction continues.

So here, as Mr. Justice ASTON observed, the Deed *not appearing to be under Seal*, it would be a like Admission as admitting a *Modus*.

† V. ante, In all other Cases, they laid down a general Rule, " that p. 2032. " it must either be pleaded below, or verified by *Affidavit.*" Theyer &c.

Wright *versus* Fawcett, Esq.

Wednesday
13th May
1767.

(In the Crown Paper.)

THIS was a Return to a Mandamus directed to Christopher Fawcett, Esq. Steward of the Court-Leet of the Burrough of Morpeth, commanding him to admit and swear Joseph Wright a Freeman of Morpeth. It set forth that the Burrough of Morpeth is an ancient Burrough; and that the said Joseph Wright had been duly elected a Freeman of the said Burrough, and thereby became lawfully intitled to be sworn and admitted, and ought by the Steward to be sworn and admitted into the Place and Office of One of the Freemen of the said Burrough. It then set forth that the said Joseph Wright, after his Election, duly tendered and presented Himself &c, and demanded of the Steward to be by Him sworn and admitted into the said Place and Office according to the Custom of the said Burrough: Yet that the Steward, well knowing the Premisses, but having no Regard for the Duty of his Office in that Behalf, did then and there, without any reasonable Cause, absolutely refuse and yet doth refuse to swear and admit the said Joseph Wright into the said Place and Office &c. The Writ therefore commands the Steward to swear and admit or cause Him to be sworn and admitted into the said Place and Office &c; and to administer or cause to be administered to Him all the Oaths which are in such Case usually administered and taken; or shew Us Cause to the Contrary thereof, &c.

Mr. Fawcett returns, That the Manor and Burrough of Morpeth now are, and from Time whereof the Memory of Man is not to the Contrary have been, an ancient Manor and Burrough; and that the Free Burgeses or Freemen of the Burrough of Morpeth aforesaid now are and immemorially have been a Body Corporate and Politic in Deed Fact and Name &c; and that the Place and Office of a Free Burges of the said Burrough, and the Place and Office of a Freeman of the said Burrough, are and immemorially have been One and the same Place and Office. The Return then proceeds to alledge, that the Right Honourable Frederick Earl of Carlisle, at the Time of issuing the said Writ, and also at the Time when the said Joseph Wright demanded of Him to be by Him sworn and admitted into the Place and Office of One of the Freemen of the said Burrough, and long before, was, and continually from thenceforth hitherto (to the Time of the Return) hath been, and yet is Lord of the Manor and Burrough of Morpeth aforesaid; and that the said Earl and all other Lords of the said Manor and Burrough for the Time being, from Time whereof the Memory of Man is not to the

Contrary, have had and have used and accustomed and of Right ought to have a *Court-LEET* or View of Frankpledge held and to be held in and for the said Manor and Burrough, before their Steward of the said Court for the Time being, twice in every Year, (Once &c, and again &c,) as belonging and appertaining to the said Manor and Burrough. The Return further certifies and alledges, that the said Earl and all other Lords of the said Manor and Burrough for the Time being, from Time whereof the Memory of Man is not to the contrary, have had and have used and been accustomed to have, and of Right ought to have certain *Courts-BARON* holden and to be holden in and for the said Manor and Burrough at certain Times of the Year, that is to say, on the Days when the said Court-Leet or View of Frankpledge hath been and ought to be holden as aforesaid, and also on *Monday* next after the Feast of the *Epiphany*, as to the said Manor and Burrough belonging and appertaining. Mr. *Faucest* further certifies and returns, that within the said Manor and Burrough there now is and from Time whereof the Memory of Man is not to the Contrary, hath been a certain ancient and laudable Custom there used and approved, that is to say, " That the Jurors " sworn and charged, at every such Court Leet or View of " Frankpledge so held and to be held in and for the said " Manor and Burrough as aforesaid, to inquire and present " those Things which to the View of Frankpledge belonged " and belongs to inquire and present, during all the Time " aforesaid have used and been accustomed and of Right ought " to be Free Burgesses or Freemen of the said Burrough of " Morpeth; and Each of them, during all the Time aforesaid, " hath been and hath been used and been accustomed and of " Right ought to be a Free Burgess or Freeman of the said " Burrough;" and that within the said Burrough there now is and for all the said Time whereof the Memory of Man is not to the Contrary, there hath been a certain other ancient and laudable Custom there used and approved, that is to say, " That the Jurors sworn to serve and serving at every Court " Baron held and to be held in and for the said Manor and " Burrough, during all the Time aforesaid, have been and " have used and been accustomed, and of Right ought to be " Free Burgesses or Freemen of the said Burrough; and Each " of Them, during all the Time aforesaid, hath been and hath " used and been accustomed and of Right ought to be a Free " Burgess or Freeman of the said Burrough." He further certifies and returns, that within the said Burrough of Morpeth there now is and for all the said Time whereof the Memory of Man is not to the Contrary, there hath been a certain other ancient and laudable Custom there used and approved, that is to say, " That EVERY Person admitted and sworn into the " Place and Office of a Free Burgess or Freeman of the said " Burrough hath been and hath used and been accustomed, and " of Right ought to be, BEFORE his being admitted and " sworn

"*sworn into the Place and Office of a Free Burges or Freeman
of the said Burrough, APPROVED of by the LORD OF
THE SAID MANOR AND BURROUGH, to be a Free Bur-
ges or Freeman of the said Burrough.*" He further certi-
fies and returns, that the said Joseph Wright was NOT *duly*
ELECTED a Freeman of the said Burrough, as in and by the
said Writ is supposed : And He further certifies and returns,
that the said Joseph Wright NEVER was APPROVED of by the
said Earl of Carlisle or any other Lord of the said Manor and
Burrough of Morpeth to be a Free Burges or Freeman of the
said Burrough. And for THESE Reasons, He says, He has
not sworn and admitted or caused to be sworn and admitted
the said Joseph Wright into the said Place and Office of One
of the Freemen of the said Burrough &c ; neither has He
administered or caused to be administered to the said Joseph
Wright All the Oaths which are in such Case usually ad-
ministered and taken, as by the Writ is commanded ; nor can
nor ought He so to do.

Mr. Walker, on Behalf of the Prosecutor, objected to this
Return, " that it was DOUBLE, and therefore bad."

A double Plea could not be admitted, even in a *Civil Cause*,
before the Statute of 4 & 5 Ann. c. 16. § 4. And that Act
does not extend to any other than Civil Cases. He then en-
tered into the Reasons of it ; and argued upon them at large.

Mr. Wallace, contra, said the Steward was required to ad-
mit and swear Him ; OR to shew Cause why He does not. He
shews two good Causes : Which He certainly may do.

The Practice is so ; as appears by the Case of *Green versus
Mayor of Durham**. And in the Case of *Ward versus Mayor** V. ante
of Newcastle (very lately,) separate Issues were found : And P. 127.
the Prosecutor of the Writ was not admitted.

In 2 Lord Raym. 1244. 5 Ann. *Regina versus Mayor and
Aldermen of Norwich*, upon a Mandamus to admit and swear
One Dunch an Alderman of Norwich ; Holt, Chief Justice
said—" that a Return may contain as many Causes as the
Persons that make the Return please." In 1 *Salk. 436. S:
C.* it is expressly said, " that the Court agreed that several
Causes may be returned."

Mr. Walker's Reasoning applies to *Pleading* only. But dif-
ferent Facts may be replied in one *Replication*.

Mr. Walker replied, that there is no Difference between
Answers to the King, and Answers to a Party : And, by Com-
mon Law, a double Answer can not be given to a Party.
Therefore, neither can it to the King.

Here we suggest only a single Fact, *viz.* "That He was duly elected." This double Answer puts it upon the Crown to shew that *both* the Answers are false. If They can give *two* Answers, They may give Two Thousand: And it can not be supposed that the Crown should be put to shew them *all* to be had: Besides, this also would distract the Attention of the Court.

In *Green's Case*, no Exception was taken to the Form of the * V. ante, Return: They took Traverses*, *Dunch's Case* not argued upon that Point. In that Case, Mr. Justice Powell said, "If p. 127. the Return be not contradictory, it is very inveigling: † 2 Ld. "The Court cannot tell what you rely upon†." Raym, 1245.

The Answer ought to be a SIMPLE Answer; though it may include several Facts.

The Statute of 9 Ann. c. 20. does not justify a double Return; though it allows several Traverses.

Lord MANSFIELD—I see no Doubt upon this Case. Here is a Duplicity in the Writ; which requires a Duplicity in the Return. The Writ states "that He was duly elected; and that He thereby became intitled to be sworn." The Answer is, "that He was not duly elected: And further, that He was not intitled to be sworn in; because He has not been previously approved of by the Lord of the Manor; which is essentially necessary, according to a Custom which the Steward sets forth, to be done before He can be admitted and sworn."

Mr. Walker's Argument would strip Him of One Half of his Case, He has two decisive Answers: And why should He be obliged to give up One of them? He is commanded to admit and swear Him; or shew Cause to the Contrary. And He shews a good Reason for not admitting and swearing Him. He says, this Person was neither elected nor approved: Both which Qualifications were essentially necessary.

Where a Man has *two conclusive Answers*, it is contrary to every Principle of Justice to confine Him to One of them *alone*: 'Tis a Rule which *never* should have been received; and the Legislature have set it right, by opening the Defence, and admitting the Defendant to plead several Pleas†.

† V. 4 & 5
Ann. c. 16.

§ 4. The Prosecutor cannot be surprised: For, both Causes are specified to Him, in the Return. And as to the Distraction of the Attention of the Court or Jury—This is as much an Objection to taking several Issues on Mandamus. And the Authorities,

Authorities, as well as the Reason of the Thing, are on this Side of the Question.

Mr. Justice YATES—Several *consistent* Causes may be returned to a Mandamus: The Number of them makes no Difference.

Mandamuses are distinguishable from the Case of *Civil Actions*.

Civil Actions concern *private Rights* between Party and Party: In *Civil Actions*, Nothing is in Question, wherein the *Public* is concerned. And the Defendant must, in these *private Cases*, know his own Defence, and upon what Foot he is to put it.

But in a *Mandamus* relating to a *public Office*, the Question is, “Whether the Person ought or ought not to be admitted to the Office.” And if He can be shewn to be an *Usurper*, the Court will not admit Him; for They ought not to admit an *Usurper*: But if He has a Right, he ought to be admitted.

The Question here is, “Whether upon the *whole Matter*, “He ought to be admitted.” The Steward is, by this Writ, commanded either to admit; or to shew Cause why he does not. And He may shew One or more Causes; provided they be consistent. Therefore this is distinguishable from *Pleas to Civil Actions*.

Mr. Justice ASTON—The Return is good, where it answers the Supposal of the Writ. This Writ charges the Steward *criminally*. It charges Him with refusing to admit and swear this Mr. *Wright*, well knowing the Premisses, but having no *Regard for the Duty of his Office* in that Behalf. So that the Steward is charged as *criminal* in that He did not admit and swear Him: And being so charged with a *Breach* of his Duty, He may return as many *consistent* Answers as He will. And this Answer is consistent: For it strictly follows the Supposal of the Writ.

Mr. Justice HEWITT—This being a Matter of a *public Nature* differs from *private civil Causes*.

If the Steward might not return several Causes, where there really are several good Objections to the Prosecutor of the Mandamus, an *Usurper* might be admitted into a *public Office*, which he has no Right to.

There

There is no Authority to warrant the Objection : The Authorities are on the other Side. Therefore He concurred in holding the Return to be sufficient.

Per Cur'. unanimously—

RETURN ALLOWED.

Thursday
14th May
1767.

Rex *versus* John Tucker and Eleven Others.

THE Defendant and Eleven Others had been indicted in the same Indictment, which was for unlawfully exercising the Trade or Mystery of tanning Leather contrary to the Statute of 1 Jac. c. 22. § 5. concerning cutting and tanning Leather.

On Thursday 5th Feb. last, it was objected by Mr. *Ashurst*, who moved on Behalf of the Defendants, to quash the Indictment—*1st*. That this is *not an indictable Offence*: For the Prosecutor ought to pursue the *Penalty* annexed to the Offence, which is specified in one and the same Clause of the Act; *viz.* Forfeiture of the Leather tanned, or the just Value thereof. And *2dly*. That *several* Defendants can not be joined in One and the same Indictment.

A Rule was then made to shew Cause: And it was now made absolute. Mr. *Wallace*, for the Prosecutor, said He thought He could support the Indictment, upon the *first* Objection; but He could not upon the *Second*.

Whereupon—

RULE made ABSOLUTE [for quashing the Indictment.]

Friday 15th Wright and Rathbone, Assignees of Richard May 1767. Scott, a Bankrupt, *against* George Campbell, the Younger, and Stephen Hayes.

THIS was an Action of Trover brought by the Assignee of Scott a Bankrupt. The Plaintiffs declare, upon their Possession of certain Quantities of Wheat and Beans, and lay their Damages at 1000*l.* The Defendants plead the general Issue. The Cause was tried before Mr. Justice

Justice Bathurst at Lancaster Assizes on 21st March 1767: When it is stated to have appeared in Evidence—

That *Lewis Fontaine*, a Merchant in London, on 4th June, shipped the Goods mentioned in the Declaration on Board a Ship called *The Two Friends*, whereof *William Spencer* was Master, then in the Port of *London* and bound upon a Voyage to *Liverpool*: And that the said *William Spencer* thereupon signed two Bills of Lading, of the same Tenor and Date as follows—

Shipped by the Grace of God, in good Order and well conditioned, by *Lewis Fontaine*, in and upon the good Ship called *The Friends*, whereof is Master, under God, for this present Voyage, *William Spencer*, and now riding at Anchor in the River of *Thames*, and by God's Grace bound for *Liverpool*, to say, 102 Quarters 4 Bushels of Wheat, in 164 Sacks; and 217 Quarters 4 Bushels of Beans in 348 Sacks, 20 Matts, being marked and numbered as in the Margin; and are to be delivered in the Qrs. Bush. like good Order and well-conditioned at the 102 4 Wheat, in 164 Sacks, aforesaid Port of *Liverpool*, the Danger of 217 4 Beans, in 348 Ditto. the Sea only excepted, unto Order or to 320 — Quarters. 512 Sacks. *Affigns*; He or They paying Freight for the 20 Matts. said Goods as per Charter-party. In Witness whereof, the Master or Purser of the said Ship hath affirmed to two Bills of Lading. All of this Tenor and Dates. The One of which Bills being accomplished, the Other to stand void. And so God send the good Ship to her desired Port in Safety. Amen.

Dated in *London*, 4th June 1766.

William Spencer.

That Mr. *Fontaine*, on the same Day, indorsed One of the Bills of Lading to *Richard Swanwick*, who was then a Merchant in *Liverpool*, as follows; viz. "Deliver the within to " Mr. *Richard Swanwick* or Order. *Lewis Fontaine*;" and, by the next Post, sent the Bill of Lading, so indorsed, to Mr. *Swanwick* at *Liverpool*, which was received by Him.

That on 2d July following, *Swanwick*, being arrested by the Sheriff of *Lancashire* for the Sum of 40*l.* at the Suit of Messrs. *Guinand* and *Hankey*, applied to *Richard Scott*, who was also a Merchant at *Liverpool*, with whom *Swanwick* had had Dealings in giving out and taking Credit upon Notes and Bills of Exchange, and to whom *Swanwick* was then indebted (upon Balance) in the Sum of 800*l.* or upwards, to become Bail for Him to the Sheriff: Which *Scott* refused doing, unless *Swanwick* would give him a Security to indemnify him against the Consequences of becoming Bail, and also a Security for his Debt. Upon this *Swanwick* produced the Bill of Lading which he had received indorsed from *Fontaine*, and offered to indorse it to *Scott*; assuring

Scott.

Scott " that the Goods comprised in it were *bis own Property*, and that he *had paid for them*;" (which was not true.) Upon this, it was agreed between *Swanwick* and *Scott*, that *Scott* should become Bail to the Sheriff; that *Swanwick* should *indorse* the Bill of Lading to *Scott*; and that He should sell the Goods, and should out of the Produce be indemnified; and what remained should be applied towards Satisfaction of the Debt due from *Swanwick* to *Scott*. And upon ^{*This should be Scott, I suppose.} this, *Scott* became Bail; and *Swanwick* *indorsed* the Bill of Lading to *Scott*, as follows; *viz.* " Deliver the within to " Mr. Richard ^{*} *Swanwick* or Order; Value received. *Richard Swanwick*"—and delivered the same to *Scott*.

That, the Day following, *Fontaine*, being come down from *London*, applied to *Scott* concerning the Bill of Lading which had been so indorsed; and informed him " that the Goods " comprised in the Bill of Lading had been consigned by Him " to *Swanwick* as a Factor only, to be disposed of for Him " (*Fontaine* :) Which was the Truth; though *Swanwick* had represented himself to *Scott*, as the real Proprietor. And *Fontaine* then insisted upon *Scott's* relinquishing any Right or Claim he might have under the Bill of Lading: Which he refused to do. Then *Fontaine* made an Indorsement upon the other Bill of Lading, for the Delivery of the Goods to the Defendants.

That, in a few Days afterwards, the Ship arrived with the Goods at *Liverpool*; and *Scott* demanded the same of the Master, by Virtue of the Bill of Lading which had been indorsed to him; and tendered the Freight and Charges: But the Master, having received an Indemnity from the Defendants, refused to deliver the Goods to *Scott*, and afterwards delivered them to the Defendants.

That *Scott* and *Swanwick*, soon afterwards, severally became Bankrupts, and a Commission duly issued against Each of them, and they were thereupon respectively found Bankrupts, and *Scott's* Effects were properly assigned to the Plaintiff; who demanded the Goods of the Defendants, and tendered to them the Freight and Charges and other Expences: But they refused to deliver them, and afterwards converted them to their own Use.

Upon which, a Verdict was found for the Plaintiff, for 431*l.* 11*s.* being the nett Value of the Goods, and 40*s.* Costs; subject to the Opinion of the Court, " Whether the Plaintiffs, under the Circumstances of this Case, are intitled to recover against the Defendants."

Mr.

Mr. Wallace, on Behalf of the Plaintiffs (the Assignees,) argued that They had a Right to recover.

By Indorsement of a Bill of Lading, the Property is transferred; and the Consignee has such a Property in it, that He may assign it over. 1 *Ld. Raym.* 271. *Evans versus Martlet* *, M. 9 W. 3. B. R.

*V. 12. Mod.
156. and

3 *Salk.* 290.
S. C.

This Assignment is absolute: Here is no Trust, no Confidence, no Restriction. *Swanwick* might have assigned and transferred the Right of it, before the Arrival of the ship.

Here was no Notice of the Goods being the Property of *Fontaine*.

Scott was a Purchaser for a valuable Consideration, without Notice.

Fontaine might, if He had thought proper, have consigned the Goods to *Swanwick*, as Factor: On the Contrary, He has consigned them to him or Order, absolutely. The Goods pass by Indorsement, as much as Money on the Indorsement of a Bill of Exchange: And *Swanwick* might transfer the Right just as well as he might have done upon a Bill of Exchange.

Mr. Davenport, contra, for the Defendant, cited 1 *Salk.* 160. *Whitecomb versus Jacob*; where it was solemnly settled that Goods or Merchandise in the Hands of a Factor shall be taken as Part of the Merchant's Estate (the Employer's,) and not the Factor's.

Swanwick could neither sell nor pledge this Bill of Lading: For, He must be considered as a Factor; and a Factor has no such Right. 2 *Str.* 1178. *Paterson versus Tash.* "He can only sell: He can not pledge the Goods, as a Security for his own Debt."

Here was no Consideration-Money paid for this Indorsement of the Bill of Lading from *Swanwick* to *Scott*: It was done, to indemnify and secure Him, upon his becoming Bail for Mr. *Scott*.

The Assurances given by *Swanwick* to *Scott* are stated "not to have been true." But whatever the Consideration of *Swanwick*'s Indorsing to *Scott* might be, yet He could not transfer more than He had: And the Assignees can have no better Right than the Consignee had.

The

The Goods never came to the Hands of *Scott*: If they had ever been in his possession, that might have been a strong Case. But Mr. *Fontaine's* Representatives have the Goods in their Hands.

How can Mr. *Scott* keep Goods of perhaps the Value of 1000*l.* to indemnify Him from becoming Bail for four or five hundred? He pretends to be liable to the Action of *Guinand* and *Hankey*, as Bail: But it does not appear that He either has actually paid, or is even liable to pay any Thing.

Being equal in Right, the Condition of the Possessor is the Best. But this seems to be a Trick between *Swanwick* and *Scott*, to cheat Mr. *Fontaine*, the true Owner of the Goods.

The Right continued in the true Owner.

Mr. Wallace, in Reply—*Swanwick* was to sell the Goods as a Trustee for *Fontaine*.

It is not material, whether there was a real Debt due from *Swanwick* to *Guinand* and *Hankey*, or not. The becoming Bail for Him was a good Consideration. And there was a bona fide Debt, at the same Time due from *Swanwick* to *Scott*. It was a quite fair Transaction between Them.

If there is no Damnification at all, the Indorsee would have stood (in Equity) in the Place of the Indorser. The Bill of Lading, being absolutely indorsed to *Swanwick*, the Property of the Goods was vested in Him. This is a Case between a bona fide Purchaser, and a Consigner: And here, the Consigner had absolutely parted with his Property to *Swanwick*; who, for a valuable Consideration assigned to *Scott*.

Lord MANSFIELD—In the present Case, Law and Equity are the same.

This is clear, that if there is an Authority ever so general, by Indorsement upon a Bill of Lading, without disclosing that the Indorsee is Factor, the Owner (as between Him and the Factor) retains a Lien, till Delivery of the Goods, and before they are actually sold and turned into Money.

If the Factor pays it over, with Notice, to a third Person, then it may be followed in the Hands of such third Person: For, in such Case, it remains in his Hands just as it did in the Hands of the Factor himself.

But

But if the Goods are *bona fide* sold by the Factor *at Sea* (as they may be, where no other Delivery can be given) it would be good, notwithstanding the Statute of 21 *Jac. 1.* c. 19. the Vendee shall hold them by Virtue of the Bill of Sale, though no actual Possession is delivered: And the Owner can never dispute with the Vendee; because the Goods were sold *bona fide* and by the Owner's own Authority.

If so, then the Whole of this Case turns upon this Question, "Whether this was a fair Transaction, *bona fide*, between *Swanwick* and *Scott*, for a valuable Consideration, and without Notice; or a Trick and Contrivance between them to cheat an honest Owner out of his Property."

Now this, which is the material Fact, is *not stated*.

Scott never inquired into the Fact, whether *Swanwick* had really bought the Goods, or was the real Owner of them. It is indeed stated that *Swanwick* told *Scott* "that the Goods were his own, and that he had paid for them." But did *Scott* believe Him? That does not appear. He trusted to *Swanwick*'s Word. No Letters were produced: No Price fixed.

Security against the Consequences of becoming Bail is the Pretence. But the being *Bail* for *Swanwick* could be no Part of the Consideration: For *Scott*'s Debt from *Swanwick* was at least 800*l.*. And the Value of the Goods was only 43*l.*. Therefore Nothing was left for the securing Him as Bail.

The Circumstances of the Case, as stated, are excessively strong to shew that these two Men contrived to cheat a Third; and that the Transaction between them was *fraudulent*. But this is not stated: The case is therefore *imperfectly stated*.

The THREE OTHER JUDGES agreed that there seemed to be a *fraudulent Collusion* between *Swanwick* and *Scott*: But that the Facts were not sufficiently stated. Wherefore—

Lord MANSFIELD— Let there be a New Trial, without Costs.

RULE accordingly:

Long

Tues. 19th
May 1767.

Long *versus* Dennis.

THIS was an Ejectment brought by *Job Long*, on the Demise of *William Hurley* and *Mary* his Wife, against *Abraham Dennis*. It was tried at the last Assize for the County of Devon, before Mr. Justice *Gould*: And a Point was reserved, upon the following Special Case.

CASE—*Robert Ballyman*, being seised in Fee simple, duly made his Will &c. dated 11 March 1727; and thereby devised unto *Richard Clarke* and *Peter Kerlake* their Heirs and Assigns, all that his Messuage Tenement or Farm called *Parke* &c; UPON TRUST to pay the yearly Rents and Profits thereof, by Quarterly Payments, to his Son *Robert Ballyman* during his said Son's natural Life: And from and after his Decease, the Trustees and their Heirs were to stand seised of the Premises, to the Use of such Woman as should be his Wife at the Time of his Death, during the Term of her natural Life, for her Jointure; subject to the Proviso or Condition next in the said Will particularly mentioned and expressed; And from and after the Deaths of his said Son *Robert* and such Woman as should be his Wife at the Time of his Death, then in Trust to and for the Use and Behoof of the first Son of the Body of the said *Robert* his Son lawfully to be begotten, and the Heirs of the Body of such first Son lawfully issuing; subject nevertheless to the said Proviso or Condition; and for Want of such Issue, to the second third fourth fifth and all and every other Son and Sons of the Body of his said Son *Robert* lawfully to be begotten, and the Heirs of their several Bodies severally respectively and successively issuing, as They should be in Seniority of age and Priority of Birth &c; subject to the said Proviso or Condition; and for Want of Issue Male of the Body of his said Son *Robert*, then to the Use and Behoof of All and Every the Daughter and Daughters of his Body lawfully to be begotten, and the Heirs of their several Bodies; subject to the said Proviso or Condition; and for Want of such Issue, then to the Use and Behoof of his [own] two Daughters *Hannah Ballyman* and *Elizabeth Ballyman* their Heirs and Assigns for ever. PROVIDED always, and it was his *very Will*, true Intent, and express Meaning, “ That in Case his said Son *Robert* should marry with any Woman not having a competent Marriage-Portion; OR without the Consent and Approbation of the said Trustees their Heirs and Assigns, in Writing under their Hands and Seals, to be executed in the Presence of Two or more credible Witnesses, first had and obtained; that then his said Trustees and their Heirs and Assigns, immediately after the Death and De-

“ cease

" cease of his said Son *Robert*, should stand and be seised of
 " the said Messuage and Tenement or Farm called *Parke*,
 " with the Appurtenances, to and for the only Use and Be-
 " hoof of his said two Daughters *Hannah* and *Elizabeth*
 " and their Heirs for ever; any Trust, Use, Bequest, Limi-
 " tation or Devise thereof to or to the Use of his said Son
Robert, or to such Woman as should be his Wife at the
 " Time of his Death, or to the Heirs of the Body of the
 " said *Robert*, or any other Trust Use Limitation Bequest
 " or Devise, or any other Thing in that his Will contained,
 " to the Contrary thereof in any wise notwithstanding."
 And his *Will*, true *Intent*, and *Meaning* was, and He did
 declare " That the said Proviso or Condition therein before
 " expressly mentioned was NOT intended by Him nor to be
 " construed or taken to be IN TERROREM; but a CONDI-
 " TION, for Want of Performance whereof in every Respect,
 " the said Lands called *Parke* should in no Case be vested in
 " such Wife of his said Son *Robert* nor the Heirs of that
 " Marriage, but (on the Contrary) that his said Trustees
 " and their Heirs should be seised of the said Premisses to
 " the only Use and Behoof of his said two Daughters and
 " their Heirs, in Manner aforesaid." And after giving
 several Legacies among his Daughters, He made the said
Hannah and *Elizabeth* his Daughters residuary Legatees and
 Executrixes. Which Will he duly signed sealed published
 and declared in the Presence of three subscribing Witnesses,
 who duly attested the Execution thereof.

The Testator *Robert Ballyman* died seised, on 18th October 1730.

Robert Ballyman the Son married *Mary Stephens* on 28th of May 1739.

In January 1765, He died ; and was buried the 29th Day of the same Month ; leaving the said *Mary* his Widow, and One Daughter called *Maria*, Both now living : Which said *Maria* married the said *Abraham Dennis* the Defendant.

Hannah Ballyman, One of the Testator's Daughters and Devisees named in his Will, died in the Month of October 1751, in the Life-time of her said Sister *Elizabeth*.

The said *Elizabeth*, the Other of the Testator's Daughters and Devisees, on the 6th Day of May 1732, married with the said *Richard Clarke*; and had Issue, by Him, *Mary* their Daughter, baptized 17th of April 1734, now Wife of *William Hurley*.

The said *Richard Clarke* and *Peter Kerlake*, the two Trustees were Both living, at the Marriage of the said *Robert Ballyman*

Ballyman with Mary Stevens. The said *Kerlake* died in November 1740: And the said *Clarke* died in February 1748.

The said *Elizabeth*, the Wife of the said *Clarke*, survived Him and also the said *Hannah* her Sister; and died in December 1754, leaving the said *Mary* her only Child and Heir at Law; who on the 29th of June 1761, married with the said *William Hurley*: Which said *William Hurley* and *Mary* his Wife are the Lessors of the Plaintiff.

The said *Hurley* and his Wife, in Right of the said *Mary*, as Heir at Law of the said *Elizabeth* her Mother, claimed Title to the said Messuage Tenement Farm and Premisses, under the said *Proviso* in the said Testator's Will; alledging "That the said *Mary Stephens* was a Woman of no Circumstances, and had not a competent Marriage-Portion at the Time of her Marriage with the said *Ballyman* the Son; and that They were married without the Consent of the said Trustees first had according to the Intentions and Dispositions of the said Testator's Will."

In Pursuance thereof, the Lessors of the Plaintiff delivered an Ejectment for recovering Possession of the said Premisses: To which the said Defendant *Dennis* appeared, and entered into the Common Rule, and pleaded. And Issue being joined, the Cause came on to be tried at the last Assizes for the County of *Devon*: When the Jury found—"That the said *Mary Stephens*, at the Time of her Marriage with the said *Robert Ballyman*, HAD a competent Marriage-Portion; but that the said *Robert Ballyman* married her WITHOUT any Consent or Approbation of the said Trustees named in the said Will;" and thereupon found a Verdict for the Plaintiff, subject to the Opinion of this Court upon the following Question—"Whether the Lessors of the Plaintiff have a Title to recover the said Premisses."

Mr. *Gould* for the Plaintiff, argued that though the Son's Wife had a competent Fortune, yet as the Words were in the *Disjunctive*, it was necessary that He should also have the Consent of the Trustees. To this Purpose He cited the Cases of *Harvey et al.* versus *Aston et al.* *Comyns* 726. and *Creagh et Ux.* versus *Wilson et al.* 2 *Vern.* 572. He said, this was a Condition precedent: And, to prove it to be so, He cited *Bro. Title* "Conditions," pl. 67. By the Words of the Will, this Estate could not have vested, till the Condition was performed. It is very strongly and particularly declared and expressed in the Will, "that the Estate should not vest in the Heirs of such Marriage, unless the Condition should be performed." *Cary versus Bertie et al.* 2 *Vern.* 333.

It will be objected " that the Trustee might have an Interest to defeat the Condition, having married One of the Testator's Daughters."

But that Objection will not hold in this Court. No such Objection was offered in the Case of *Creagh et Ux'*. versus *Wilson*, 2 *Vern.* 572. and in *Harvey et al'*. versus *Aston et al'*. *Comyns* 750. it is said—" As to the Supposition That such a Trustee may act out of Interest, or for By-Ends, and so refuse Consent without any Ground, such Proceeding would surely be a Breach of Trust; which this Court (the Chancery) may find Means to remedy, as well as in Case of other Breaches of Trust."

In the present Case, this Condition is *not well performed*: And therefore the Lessors of the Plaintiff ought to have Judgment.

Mr. Serjeant *Glynn*, who was to have argued for the Defendant, was not come down. But Lord MANSFIELD said He was quite clear on his Side, without hearing Him.

Lord MANSFIELD—Conditions in Restraint of Marriage are *odious*; and are therefore held to the utmost Rigour and Strictness. They are contrary to sound Policy. By the Roman Law, they are all void.

Conditions *precedent*, must previously exist. Therefore in these, there can be no *Liberality*, except in the Construction of the Clauses.

But in Cases of Condition *subsequent*, It has been established by Precedents, that where the Estate is not given over, they shall be considered as *only in Terrorem*. This shews how odious such Conditions are: For, in Reason and Argument, the Distinction between being or not being limited over is very nice; and a Clause can carry very little Terror, which is adjudged to be of no Effect. Though, to be sure, the Reasoning will not hold. If the Estate is given over, such a Condition cannot be got over.

The present Case is *doubly in Terrorem*; and made so by adding the Clause " that the said Proviso or Condition was not intended by Him, nor to be construed or taken to be in *Terrorem*."

In the Case of *Daly versus Clanricarde*, in Chancery 10th December 1738, the Condition was—" that she should marry with the Consent of Trustees;" if not, the Estate was given over. The Trustees were applied to: They offered to agree,

agree on a proper Settlement being made. The Marriage was had, without their Knowledge : But, the Settlement being afterwards made, their conditional Consent was holden to be sufficient.

In the Case of *Burlton et Ux^r.* versus *Humphries and Others*, 20th February 1755, in *Canc.* the Condition was, " that if " She married without the Consent of *N. H.* in Writing, " then &c :" And the Estate was given over. She married without his Privity : But He gave his Consent as soon as he knew of the Marriage. Lord *Hardwicke* held this a sufficient Consent to intitle Her to the Real and Personal Estate which was given Her, if She married with the Consent and Approbation of *N. H.* to be signified in Writing.

I mention these Cases, to shew that the Court ought not to make Strides in Favour of a Forfeiture.

There can be but One true legal Construction of these Conditions : and therefore it must be the same in the Court of *Chancery* and all the other Courts of *Westminster-Hall*.

The Meaning of the Testator, or the Control which the Law puts upon his Meaning, cannot vary ; in what Court soever the Question chances to be determined.

In the present Case, the Forfeiture is so cruel as to begin with the *innocent Issue* of the Offender, who is to have it for his own Life, at all Events.

This Testator considered Money as the only Qualification of a Wife : But He still means to leave it to the *Judgment of the Trustees*, " whether there might not be some Equivalent for Money :" He only meant to require their *Sanction*, in Case his Son married a woman without a competent Fortune.

This is undoubtedly a Condition precedent : It must have been performed before the Son could take ; before his Interest could vest.

The Construction must be, to vest the Estate, " in Case his Son married a Woman with a competent Fortune, or had the Consent and Approbation of his Trustees to marry a Woman without one :" The Blunder is in the *Penning* only. The Meaning is—" that in either Event, it shall vest." The Performance of either Part of the Alternative vests the Estate.

Here is no Objection to the Marriage. And One of the Trustees is become One of the Devisees over. Therefore a *Cause*

Cause of Objection ought to be *shewn*: Otherwise it shall be considered as if his Consent was with-holden without Reason.

The Consequence is, that the Judgment must be *against* Mr. Gould's Client.

The THREE OTHER JUDGES concurred in thinking it to have been the Intention of the Testator, that his Son's complying with either Part of the Alternative should be a Performance of the Condition; and that he did not incur a Forfeiture, unless he had broken both Parts of it. And they ALL agreed, that All Conditions in Restraint of Marriage ought to be construed with the utmost Rigour and Strictness.

Per Cur. unanimously —

POSTERIOR to be delivered to the DEFENDANT.

Morris, Esq. *versus* Miller, Esq.

THIS was an Action for Criminal Conversation with the Plaintiff's Wife. The Cause came on to be tried on the 24th of February last: when it was not thought necessary to have a Special Verdict found: but it was agreed that a Verdict should be found for the Plaintiff, with 500*l.* Damages; subject to the Opinion of this Court, upon the following Question —

"Whether, to support an Action for a Criminal Conversation, there must not be a Proof of an *actual* Marriage?"

The FACT was, They were married at May Fair Chapel. *The Register or Books could not be admitted in Evidence. *V. 26 G. Keith, who married them, was transported: and the Clerk, 2. c. 33 who was present, was dead. So that the Plaintiff could not § 14. 15. prove the actual Marriage, by any Evidence.

On the first Day of this Term, Mr. Serjeant Davy, on behalf of the Defendant, moved for Leave to enter up Judgment as in Case of a Non-suit; in order to have the Opinion of the Court, upon the Question referred at the Trial.

His Objection was, "That the Verdict was found for the Plaintiff, without sufficient Evidence of the Plaintiff's Marriage."

A Rule was accordingly granted, for the Plaintiff to shew Cause why the Verdict should not be set aside, and a Judgment of Non-suit entered for the Defendant.

Lord MANSFIELD observed that This was the best Method to put it into : For there was no Need of a Special Case, upon such a Question as this.

Yesterday, (Monday 18th May 1767,) it was argued by Sir Fletcher Norton and Mr. Stowe, for the Plaintiff; and by Mr. Serjeant Davy and Mr. Wallace, for the Defendant.

The COUNSEL for the Plaintiff insisted that the Evidence was *admissible* : And the Jury had believed it.

We proved Articles between the Man and his Wife, made after Marriage, for the settling of the Wife's Estate, with the Privity of Relations on both Sides. We proved *Cohabitation*, *Name* and *Reception* of Her by every Body as his *Wife*; though We did not indeed prove it by any Register, or by Witnesses who were present at the Marriage.

In Ejectment, five Months ago, before Lord Mansfield, this Sort of Evidence was offered and received.

Lord MANSFIELD---It certainly may be done so, in all Cases, except *Two* : One is in Prosecutions for Bigamy ; and this Case (if such Proof cannot be here received) is the Other.

Sir Fletcher Norton---The Defendant *confessed* to the Landlord of the Lodgings, " That She was Captain " Morris's Wife, and that He had committed Adultery with " Her " And *Confession* is the *strongest* Evidence, even of the highest Crimes. So that this Confession is a *Proof* of an *actual* Marriage. But, in the present Case, it was *not* necessary to prove strictly an *actual* Marriage.

The Plaintiff's Counsel therefore prayed, that the Rule might be discharged, and the Verdict stand.

The COUNSEL for the Defendant objected to the *Admissibility*, of the Evidence of a *reputed* Marriage only, as they termed it. Their Objection consisted of two Parts: (1st.) It does not come up to the Rule " of being the *best* Evidence in the Plaintiff's Power;" (2dly.) It is only an *Inference* of Marriage, a mere *Reputation* of Marriage.

The Confession can not be extended beyond a Confession of its being a Marriage in *Reputation* : The Defendant knew Nothing of any Marriage in *Fact*.

Sir

Sir Fletcher Norton, in Reply, said that *Confession* is better than Proof by *Witnesses*: It renders such Proof unnecessary. *Confession* would be good Evidence on a Prosecution for *Bigamy*. Therefore it is the best Evidence in the Plaintiff's Power. A Confession without Restriction or Limitation must be taken in the strongest Light *against* the Party making it.

Lord MANSFIELD—I do not, at present, remember any Action for Criminal Conversation, where an *actual* Marriage was *not* proved. Proof of *actual* Marriage is always used and understood in Opposition to Proof by Cohabitation, Reputation, and other Circumstances from which a Marriage may be *inferred*.

We will tell you our Opinion To-Morrow.

CUR' adiſare vult.

Lord MANSFIELD now delivered the Opinion of the Court.

We are ALL clearly of Opinion that in this Kind of Action, an Action for Criminal Conversation with the Plaintiff's Wife, there must be Evidence of a Marriage *in Fact*: Acknowledgment, Cohabitation, and Reputation, are *not* sufficient to maintain this Action.

But We do not at present define *what* may or may not be Evidence of a Marriage *in Fact*.

This is a Sort of Criminal Action: There is no other Way of punishing this Crime, at Common Law.

It shall not depend upon the mere Reputation of a Marriage, which arises from the Conduct, or Declarations, of the Plaintiff Himself.

In Prosecutions for Bigamy, a Marriage *in Fact* must be proved.

No Inconvenience can happen by this Determination: But Inconvenience might arise from a *contrary* Determination; which might render Persons liable to Actions founded upon Evidence made by the Persons Themselves who should bring the Action.

JUDGMENT OF NONSUIT.

Pitt *versus* Yalden.

MR. Serjeant Nares and Mr. Dunning shewed Cause, Yesterday, "why the Attorney for the Plaintiff should not pay the Debt and Costs;" for not having declared against the Defendant *within two Terms*; by the Omission whereof the Defendant obtained his Discharge. They dis-

* This Rule puted the Meaning of the Rule * made in Tr. 2 G. 1. 1716; may be seen and also the Attorney's being charged with the Debt in this ^{ante, p.} summary Way: It ought, at least, to be left to the Jury, to judge of the *Quantum* of the Damage the Plaintiff may have sustained.

¹⁴⁴⁹⁻ Sir Fletcher Norton and Mr. Selwin, *contra*, for the Plaintiff.

The Point of Law, they said, is fully settled, "That the Term in which the Arrest was made, is to be considered as One of the two Terms." For which, they cited *Pullen versus White*, which Case is reported *ante*, Vol. 3. p. 1448. They also cited a Case of *Ruffel versus Stewart*, in C. B. lately; where, in an Action against Mr. Palmer, Attorney for the Plaintiff *Ruffel*, a Verdict with 500l. Damages was given against *Palmer*, for his Ignorance of or mistaking

^{† See this Case report- ed, ante, p.} this very Rule. Therefore they argued, that no Attorney can now defend Himself under Ignorance of it, or mistaking the Meaning of it: For All Practisers are now bound to take

1787, 1788. Notice of it; and must answer it to their Clients, if they

[Note. I neglect it.

have the

reported the

Damages

given to have been fifteen hundred Pounds: But they were only five.]

And the Remedy may be had by their Clients against them, either in a summary Way; or by Way of Reference to the Master, "to see what Damage the Plaintiff has suffered;" or it may be sought by an Action, if the Plaintiff chooses that Method.

Note. It was said, that in *Palmer's Case*, the Lord Chief Justice of the Common Pleas, on the first Trial, directed the Jury to find the *Whole* in Damages: But He was afterwards satisfied that He should have left the *Quantum* of the Damages to the Jury. And upon this Mis-direction, a New Trial was granted: And on the New Trial, the Jury gave 500l. Damages, only; and this, upon the Foot of a *traffa Negligentia*.

^{‡ See this cited Case}

more particularly stated, at the End of the present Case,

Lord

Lord MANSFIELD----That Part of the Profession which is carried on by Attorneys is liberal and reputable, as well as useful to the Public, when they conduct themselves with Honour and Integrity; And They ought to be protected, where They act to the best of their Skill and Knowledge. But every Man is liable to Error: And I should be very sorry that it should be taken for granted, that an Attorney is answerable for *every* Error or Mistake, and to be punished for it by being charged with the Debt which he was employed to recover for his Client from the Person who stands indebted to Him.

A Counsel may mistake, as well as an Attorney. Yet no One will say that a Counsel who has been mistaken shall be charged with the Debt. The Counsel indeed is honorary in his Advice, and does not *demand* a Fee: The Attorney may *demand* a Compensation. But neither of them ought to be charged with the Debt for a Mistake.

Not only Counsel, but Judges may differ, or doubt, or take Time to consider. Therefore an Attorney ought not to be liable, in Cases of reasonable Doubt.

I own, I was alarmed at the Verdict against *Palmer*. The Case was before Me at Chambers: where it was insisted that the Reason of not charging the Defendant in Execution, was upon Account of a Compromise depending. I referred them to the Court; and the Court thought there was no Compromise depending. They had no Doubt upon the Construction of the Rule.

Lord Chief Justice *Wilmot* told Me, after the second Trial, (if I remember right,) that his Opinion was, at first, with the Defendant. But that it afterwards came out, upon the Defendant's own Evidence, (and the Verdict went upon that Foot,) "that it was *lata culpa*, or *cassa Negligentia*, in *Palmer* the Attorney; and that there appeared to be in " Reality *no Ground* for the Pretence of a Compromise;" (which had been made Part of Mr. *Palmer's* Excuse and Defence)

Here I think it is not a *clear* Case enough for the Court to proceed in a summary Way. In *some* Cases, the Court may certainly do so: But in *this* Case the Plaintiff ought to be left to his *Action*.

The Attorneys * are far from having been guilty of any * There gross Misbehaviour. It does not appear to Me, that They were two were grossly negligent, or grossly ignorant, or intentionally Partners; blamable: They were Country-Attorneys; and might not, (Mr. Wight- and Wick and
Mr. Hud-
son.)

* 4 & 5 W. & M. c. 21. and probably did not know, that this Point was settled here & M. C. 21. above. The Words of the Act* are not so explicit as to direct them clearly: And they might act innocently. § 2.

Therefore We ought not to proceed against them in a summary Way.

Mr. Justice YATES—The Practice upon the Rule of *Trin. 1716, 2 G. 1.* is settled, “that the Term in which “the Defendant is arrested, is reckoned as *One* of the two “Terms; and that if the Defendant be not charged with a “Declaration before the End of the second Term, he shall “be discharged out of Custody on filing Common Bail, “without giving Notice to the Plaintiff or his Attorney.”

And though the Words of 4 & 5 W. & M. may favour the Plaintiff; yet that does not make the Rule inconsistent with the Act.

Every Court may modify its own Rules of *Practice*, if not inconsistent with the Law. And this Rule of Court is clear and plain, “that the Defendant shall be discharged, unless “he be charged with a Declaration *within* the two Terms.”

But We ought not, in that Case, to entertain an Application for a *summary* Proceeding: It ought to be left to a *Jury*, as to the *Quantum* of Damages. The *Whole* of the Debt might not be recoverable: There may be favourable Circumstances; and these are so. The *Real* Debt is *not ascertained*, nor the *Quantum* of it.

Palmer's Case was stronger than the present. There, the Defendant was in Execution. The whole Debt there was 3000*l.* *Palmer*, the Master, was reminded by his Clerk, “that “He should charge the Defendant in Execution;” And there were other Circumstances. The Expectation of a Compromise, which had been urged as an Excuse, appeared to be only a *Fretence*, when it came to be examined into.

Therefore I think this Rule ought to be discharged; but not with Costs.

Mr. Justice ASTON and Mr. Justice HEWITT concurred in the same Opinion.

Per Cur'. unanimously—

RULE DISCHARGED, but without Costs.

Lord

Lord MANSFIELD now (on *Tuesday* the 19th) mentioned, that He had seen Lord Chief Justice *Wilmot* since Yesterday ; and talked with Him about the Case of *Russell versus Stewart* in C. B. (*Palmer's Case:*) And Lord Chief Justice *Wilmot* told Him, That at the setting out of the Cause, He thought it very hard, and not at all reasonable, that an Attorney should be made answerable for Debt, upon Account of a mere involuntary undesigned Mistake in a nice Point of Practice ; but afterwards, upon the Examination of Mr. *Palmer's Clerk*, it appeared that Mr. *Palmer* shewed Him a Memorandum relating to a Compromise beween the Parties : but the Clerk told Him “ that He *must* nevertheless charge “ the Defendant within the Two Terms.” Mr. *Palmer* however, did *not* charge Him within the two Terms : And the Hope or Apprehension of a Compromise was pretended to have been the Cause of not doing so. (And it appeared in *this Court* too, that *Palmer* urged the Apprehension of a Compromise as an Excuse for his delay to charge the Defendant in Execution.) But Lord Chief Justice *Wilmot* said, it appeared upon the Evidence, in the latter Part of the Course of the Cause which was tried before Him that the Attorney of the Plaintiff had offered to Mr. *Palmer*, that if He would declare upon his Honour “ that the Hope or Apprehension of “ a Compromise was *really* the true Cause of his neglecting “ to charge the Defendant within Time,” the Plaintiff would be satisfied with such Declaration upon his Word and Honour. *This Palmer* declined. He could not, (as it must be supposed, from his rejecting so fair a Proposal,) make such a Declaration, consistently with Truth and Honour.

This Circumstance changed the Opinion of Lord Chief Justice *Wilmot* ; which, before this Evidence was given, was in Favour of *Palmer*, as *not* being liable. And thereupon, He charged the Jury upon the Foot of a culpable Negligence: What I called Yesterday a *lata Culpa*, or *craffa Negligentia*. The Jury gave a Verdict, for the Plaintiff, with 500*l.* Damages. And He was very well satisfied with the Verdict.

Rex versus Killett, Clerk.

Wednesday
20th May
1767.

A Conviction of a Clergyman, before a Justice of the Peace, upon 19 Geo. 2. c. 21. § 13. for neglecting to read the Act to prevent profane Curseing and Swearing, was quashed because the Evidence was not stated and set out, so as that the Court could judge of its Sufficiency.

It set forth, that on such a Day and at such a Place, *R. E.* one of the Churchwardens of *B.* came before him, and gave Information &c. The Information fully charged the Offence; specifying that the Defendant was *Parson* of the Parish, and that he officiated as Such, on one of the Days mentioned in the A&t of Parliament and omitting and neglecting to read &c; and that the Defendant was duly summoned; but neglected to appear, or make any Defence: Whereupon, the Justice proceeded to examine into the Truth of the said Charge; and the same, AS SET FORTH, BEING DULY PROVED before him, as well by the Oath of the said *R. E.* as by the Oath of *G. C. of B.* aforesaid Farmer, a credible Witness, He adjudged the Defendant guilty, and convicted him in *s.l.*

THE COURT held, that the Evidence ought to be set out. They said, this was clearly so settled in *Rex versus Biffex, T. 1756, 29 & 30 G. 2.* in this Court. Whereas here it is only said, “the same, as set forth, being duly proved.” *V. 10th Mod. (Lucas's Reports) 213. Queen and Green, B. R. Hil. 12 Ann.* “It ought to appear to the Court, from the Nature of the Evidence, specially set forth, that the Defendant was guilty.” See alio the Case of *Rex versus Vipont et al.* *P. G. 3. (ante, Vol. 2. p. 1165.)* So it was also settled in the Case of *Rex versus Lloyd, M 8 G. 2 B. R.* which is reported in *2 Stra. 999.* and was cited and relied on by Mr. Justice Denison in delivering the Resolution of the Court in the Case of *The King and Biffex*; where he declared, that the Case of *The King and Queen against Pullen and Others* (of Oath made de Veritate Praemissorum generally, without setting it forth specially, being sufficient in Convictions) is not Law now; it having been, since that Case, quite settled “that upon a Conviction it is necessary that the Evidence should be set out, that the Court may judge whether the Justices have done right:” But upon an Order, it is not necessary; because the Court will presume that they have done right.

CONVICTION QUASHED.

Thursd. 21
May 1767.

Saunderson versus Rowles.

UPON a Trial before Lord MANSFIELD at Guildhall, in an Action of Trover brought by a Creditor of a Victualler, claiming under a Bill of Sale made to Him by the Victualler, before the Victualler had committed any A&t of Bankruptcy, against the Defendant who claimed the same Goods under the Assignment of the Commissioners, as Part of the Bankrupt's Estate and Effects; this Question arose—
“ Whether

" Whether a **VICTUALLER** who does not exceed the ordinary Course of that Occupation, but uses it just in the same Manner as other Victuallers generally do, be a *Trader* c. 7. 1 Jac. 1. within the Idea of the *Bankrupt Actus**, so as to be liable to a Commission of *Bankruptcy*." c. 15. 21 Jac. 1. c. 19. 13 & 14 C. 2. c. 24. 5 Geo. 2. c. 30.

A Verdict was found for the Plaintiff, and 31*l.* Damages; subject to the Opinion of this Court.

On Saturday the 9th of this Month, a Motion was made by Mr. Serjeant *Davy*, on Behalf of the Defendant, for a Rule to shew Cause why the Verdict should not be set aside, and Judgment entered for the Defendant.

T E L E TO shew CAUSE.

Sir *Fletcher Norton* and Mr. *Mansfield*, Yesterday, shewed Cause against the Rule.

The Usage and Practice of late Years has extended Bankruptcies beyond the Intention of the Law. In the present Commission, this Man was called Victualler, Dealer and Chapman. If He was a Dealer, there is indeed no Doubt in the Case: But there was no Evidence, at the Trial, of his being Dealer, or Chapman; only that He was a *Victualler*. And as such, he is not an Object of the Bankrupt Laws.

A Victualler only exercises a *Calling*, (for it can not be called a *Trade*,) by *Permission*; by a *Licence*: And the Object of his Dealing is under a *Restraint*; He is obliged to sell at the Price put upon his Goods by the Magistrates; He is obliged to receive Soldiers.

The Reasons why an Inn-keeper can not be made a Bankrupt, are laid down in the Case of *Newton versus Trigg*, 3 Mod. 329. He buys and sells under Restraint and particular Limitation. His Calling is of Necessity, and he is under the Inspection of the Public and the Power of Justices. He does not deal upon Contracts, as other Traders do. What he buys is to a particular Intent: For, 'tis to spend in his House; and though he gets his Living by it, yet he does not trade at large, *ad plurimum*. An Inn-keeper is bound to receive Guests: And 'tis chiefly upon this Account that he hath several Privileges which other Traders have not. And the Case of a *Victualler* is not distinguishable from an Inn-keeper, within the Meaning of the Acts relating to Bankrupts. Where a Man buys and sells under a Restraint and particular Limitation, though 'tis for his Livelihood, yet he is not within these Statutes.

Inn-

Inn-keepers may indeed become Bankrupts, where it has been found they have had other Dealings; as a Vintner &c: And so likewise a Farmer may, when He becomes a General Dealer.

But this Man was a mere Victualler: His whole Effects amounted only to 100*l.* And he owed his Brewer 80*l.* He was no general Dealer, nor went beyond the Line of his Dealing as an Alehouse-keeper.

In the Case of *Meggot, Assignee of Wilson, (or Watson) versus Mills and Waine*, reported in 1 Lord Raym. 286, and in 12 Mod. 159—there was no express Decision, as appears by the last mentioned Report: because there was a Disagreement about the Facts, and therefore it was ordered to be tried again.

Mr. Serjeant *Davy* and Mr. *Dunning, contra*, argued in Support of the Rule; and said that Nothing was more frequent, than Commissions of Bankruptcy against Victuallers.

It has been determined that a Farmer who plants annually divers Acres of Potatoes, and buys and sells Potatoes for Gain, may be a Bankrupt. *Mayo versus Archer*, 1 Str. 513, 514. One that buys and sells Apples, Cyder, Wood or Hops, may be a Bankrupt. So may a Shoemaker; or a Taylor, who sells the Cloth as well as makes it up. So may a Tanner. So also may a Vintner, who buys and sells Wine, by Retail: Yet he deals by Licence.

Lord MANSFIELD—That has not been determined. It has been much agitated, and was solemnly argued before the Lords, who ordered a *Venire de novo*, in the Case of *Hazlewood versus Chandler*.

The Counsel for the Defendant proceeded—

The Quantity of the Effects, or the Value of the Thing bought and sold is immaterial.

An Inn-keeper, selling Corn out of Doors, may be a Bankrupt.

In the Case of *Meggot, Assignee of Wilson, versus Mills et al.* Lord Chief Justice *Holt*, (who was not contradicted by the other three Judges) said, expressly, “ That a Victualler ‘may be a Bankrupt.’” And this Opinion has been followed ever since. This is decisive.

A Baker,

A Baker, who is under the same Restraint as a Victualler, by Assize, may be a Bankrupt. And a Victualler, who sells Brandy, Wine, &c, by Retail, *out of Doors*, may therefore be so too.

Lord MANSFIELD said, there could be no Doubt but that if a Victualler deals as a Merchant, and sells *large Quantities* of Liquor out of Doors, he may be within the Bankrupt Laws: But this Man sold only *small Quantities* out of Doors, as other Victuallers do. The Difficulty arises upon his Selling *out of Doors*. We will consider what Alteration that makes.

I don't lay any Stress upon the Frequency of these Commissions, where no Objections have been made to them.

CUR. *advisare vult.*

Lord MANSFIELD now delivered the Resolution of the Court.

He stated very particularly and minutely, from his own Notes taken down at the Trial, (which He read to the Audience *verbatim*), the exact State of the Facts as they came out upon the Evidence: Which He chose to do, that the Bar and the Students might be fully and exactly apprized of the true Circumstances whereupon the Court grounded their Opinion; and might not misapprehend Them to have determined *generally*, "That Victuallers could not in *any* Case be considered as Traders within the Acts relating to Bankrupts."

The Facts, according to his Notes, He said, were *these*— Shrowder was a Publican, that is, an Alehouse-keeper or Victualler. He bought Wine, Brandy, Beer; and sold it *in* his House; and might occasionally sell them, *out of* the House, in *small Retail Quantities* by the Pot or Mug, as all Publicans do: And He kept an Ordinary. He had a Licence to sell Wine, and also to sell Brandy and other Spirituous Liquors. His Lordship said, He found (upon looking over his Notes,) that He had not added the Words "*and not otherwise*"—as He thought he had: But He looked upon what He had taken down to be *tantamount*, and the same in Effect. He had taken down the Question thus— "Whether He is a Trader within the Statutes relating to Bankrupts." If He is, the Verdict is to be for the Defendant: If he is not, the Verdict is to be for the Plaintiff, with *31l. Damages*: The Question therefore referred to the Consideration of the Court is, "Whether a Victualler who sells Liquor *in* his House, and only sells them *out of* the House

" House in small Retail Quantities as every Publican does, i
" " an Object of the Bankrupt Laws."

So that it is here reduced to the very same Case as that of an *Inn-keeper*.

**V Crisp v. Pratt, Cro. Car. 549.* " That an *Inn-keeper* is not, as Such, (*quatenus Inn-keeper,*) Sir William " within those Laws."

Jones, 437.

S. C. March 34. S. C. Newton *v. Trigg*, 3 Mod. 329. and 1 Salk. 109. S. C. 3 Lev. 309. S. C.

The *Analogy* between the two Cases of an *Inn-keeper* and a *Vi&tualler* is so strong that it can not be got over.

And We are All clear, that this Man is not *within* these Laws: upon the Authority of the determined Case of an *Inn-keeper*, and also upon the *Reason* of the Thing. He makes no particular Contract, like a Trader. He can not be said to get his Living by buying and selling, as a Trader does, He buys, only to spend in his House: And when He utters it again, it is attended with many Circumstances additional to the mere selling Price. He can not be considered as a Trader at large,

The only Authority against this, is the *Dictum* of Lord Chief Justice *Holt*, " That though an *Inn-keeper* cannot be a Bankrupt, yet a *Vi&tualler* may ;" reported in 1 Ld. Raym. 287 and 12 Mod. 159 in the Case of *Meggott, Assignee of Wilson versus Mills and Another*. But that is an *obiter* Saying only; and not a Resolution or Determination of the Court, or a direct solemn Opinion of the great Judge from whom it dropped.

This *Dictum* of Lord Chief Justice *Holt's* is no formed decisive Resolution; no Adjudication; no professed or deliberate Determination. That Case was in the Year 1697: And Lord *Raymond* was then a young Man. But it is impossible for any Man to take down in a perfect and correct Manner, every *obiter* Saying that may happen to fall from a Judge, in a long or complicated Delivery of his Opinion and the Reasons of it.

However, even this Authority is crossed by the Case of *Newton versus Trigg*; reported in 3 Mod. 327. 1 Show. 96. 268. 3 Lev. 309. Cartb. 149. Comb. 181. and 1 Salk. 109.

Therefore this mere *obiter* Opinion ought not to weigh against the settled direct Authority of the Cases which have been deliberately and upon Argument determined the other Way.

As to a *Licence*—There is no Stress to be laid on that: It is only a Mode of laying on a Duty.

This Dealing of a Victualler, in the ordinary Course of his Business, is not such a Contract as is made amongst Merchants and Shop-keepers or other Dealers, in the ordinary Course of *Trade and Commerce*.

The Inconvenience would be very great, if these Persons were liable to Commissions of Bankruptcy. It would be very mischievous that Commissions should be taken out, at 7*l.* or 8*l.* Expence, in every Case where a Victualler should be unable to pay his Debts. His whole Effects might scarce suffice to answer the Expence of the Commission.

We are ALL clear, that this Man, upon the Facts which I have particularly stated, is *not* an Object of the Bankrupt-Laws. And in Consequence of this Opinion of the Court, the Verdict is to stand: Which was a

VERDICT for the PLAINTIFF, with 3*l.* Damages.

Faikney *versus* Reynous and Another.

Friday 22d
May 1767.

THIS was an Action of Debt upon a Bond. The Defendants prayed Oyer of the Condition; and then pleaded the Act of Parliament of 7 G. 2. c. 8. ("An Act to prevent the infamous Practice of Stock-Jobbing;") and that the Plaintiff and Richardson were jointly concerned in certain Contracts &c. That the Plaintiff, contrary to the Statute, voluntarily gave to divers Persons large Sums of Money &c amounting to the Sum of 300*l.* for compounding and making up Differences for the not delivering Stock &c. and for not performing Contracts &c. (following the Words of the Act of Parliament:) And that this Bond was given by the Defendants to the Plaintiff for securing the Repayment of 150*l.* (being the Moiety of the said Sum of 300*l.*) to * *Q. a.* Whe-
therRichard-
son was not
the Plaintiff, by the said Richardson*.

a *Co-Oblige* with Reynous, and also a *Co-Defendant* in this Cause. [I never saw the Pleadings.]

To this Plea the Plaintiff demurred: And the Defendant joined in the Demurrer.

Mr. Wallace, for the Plaintiff, argued that this Plea was a bad One, and no Defence against this Bond.

The

The Defendant insists, that the Bond is *void*, as being entered into for securing the Repayment of Money paid *illegally* and *contrary to this Act* of Parliament.

The Question arises upon § 5. of that Act, which is calculated for preventing the Compounding or making up *Differences* for Stocks or other public Securities; without specifically executing the Contract, and actually delivering the Stock &c. The Offence constituted by this Act, is the Compounding Differences, instead of actual Performance of the Contract: And a Penalty or Forfeiture of 100*l.* is inflicted upon the Offender.

But this *Bond* is not within the Clause. It is, at most, a voluntary Bond, given for Reimbursing the Plaintiff the Moiety of a Sum of Money which the Plaintiff had paid on Account of *Richardson* and Himself. It is for the Payment of Money only. No illegal Consideration appears upon the *Face* of it: And Nothing *debors* can be received. The Matter objected by the Defendant can not be received by the Court, as *invalidating the Bond*; because it neither appears upon the Record, nor is in itself criminal at Common Law: And the Statute not having declared such a Bond void, the Court will not attend to this Averment, because this was not any Offence till the *Act of Parliament* made it One. *Noy. 72. Gregory versus Olden.* In Debt upon an Obligation, It was said "that it was made upon a Simoniacal Contract: and so "it was for Simony." All that was averred to be Matter *debors*, and not appeared within the Deed. And for that, the Plaintiff had Judgment: For, no such Averment is given by the Statute.

Mr. Cox, contra, on Behalf of the Defendant, argued, that the Money was paid by *Faikney* the Plaintiff, contrary to Law: And this Bond given to secure the Repayment of it to Him, was in its Nature void.

If *Faikney*, instead of paying the 3000*l.* had only given a *Bond* for that Sum to those he had contracted with; such Bond would have been void. And this Bond for securing to *Faikney* the Repayment of *Richardson's* Half of that Sum, was (as *Mr. Cox* argued) tantamount to it, and equally void. And he compared this Bond given to *Faikney*, for Repayment of Money illegally paid by him, to the Case of a Bond given by a third Person for Repayment of Money given to compound a Felony.

He observed, that by the first Section of this *Act*, *Faikney* might recover back the whole 3000*l.* from the Persons to whom

whom he had paid it : In which Event, he would even be a Gainer of 1500*l.* if he could also recover so much upon the present Bond, and thereby be *twice* paid.

If two Partners in Smuggling should be to pay Money upon an illegal Consideration ; and One of them should pay the Whole, and take a Bond from the Other for Half ; such Bond, he said, would be void.

So, if the Money secured by the Bond was advanced and paid in any criminal Transaction.

And He mentioned a Case in the Exchequer, a few Years ago : where the Court would not relieve, in a Contract between two Highway-Men : For, the whole Transaction was founded on a criminal Offence.

So here, *Faikney* and *Richardson* were Partners in all these Contracts : And both Partners were culpable. *Faikney* was the Principal: *Richardson*, only a Partner. The Plaintiff (*Faikney*) was not an innocent Person ; but principally criminal, and the actual Offender.

This is a mere Evasion of the Act ; and would render it quite nugatory. It is totally at an End, if this Bond is not void : For, the Money would, or at least might, always be paid in this Method, if this Method should now be allowed.

As it was a Matter of great Consequence, He therefore hoped for another Argument ; and said He had not had sufficient Time to prepare an Argument in Support of the Demurrer.

Mr. *Wallace*, in Reply—The imaginary Bonds which Mr. *Cox* has supposed, would *not* be void. However, this Bond can, at the utmost, be no more than a Bond without a legal Consideration to support it. But if it were so, it would be no more than a voluntary Bond ; and would be good between the *Parties*.

This Money can never be recovered *twice*. For, the first Section of this Act gives no such Recovery to the Plaintiff, as Mr. *Cox* has surmised : It is confined to the particular Cases therein specified ; *viz.* Putts, Refusals, and Wagers.

Lord MANSFIELD was clear that the Matter contained in this Plea is *no* Defence against the Action brought upon this Bond.

The Offence relied upon as furnishing a Ground of Defence against being liable to pay it, is *not malum in se*: 'Tis only prohibited by this *Act of Parliament*.

He mentioned a Case of One *Hales*, a Broker, (before Himself at *Nisi prius at Guildhall*,) where a Riscounter Contract, prohibited under a Penalty by the Stock-Jobbing Act 7 G. 2. c. 8. was held to be void; and that the Plaintiff could not recover thereupon.

But here, One of these two Persons had paid Money for the Other, and upon his Account. And He gives Him his Bond to secure the Repayment of it. This is not prohibited. He is not concerned in the Use which the Other makes of the Money: He may apply it as He thinks proper. But, certainly, this is a fair, honest Transaction *between these Two*.

If Money be lent in Order to pay a *Play-Debt*, (supposing the Lender not to have been present at the Time and Place of the Play;) or in Order to pay off an *usurious Contract*, or even to *lend out upon Usury*; and a Bond be given for securing the Repayment of the Money so lent; such a Bond will not be void: The Obligor will be bound to pay it. Its being *voluntary* is *not*, of itself, an Objection to his being liable to the Payment of it: It is a good Bond, unless something appears to render it otherwise.

The THREE OTHER JUDGES concurred, that this Bond was *not* within the *Act of Parliament*, nor did it appear to have been given upon any illegal Consideration; and that the Plea was no Defence against the Payment of it: And therefore that it remains a *good Bond* upon the *Face of it*, till the Obligor can *shew* that it is bad.

They observed, that paying Money to compound these Differences was not a *Malum in se*; but only stood prohibited by this *Act*; which neither says nor means to invalidate All Securities relating to it, (as the *Act* against excessive Gaming does;) It only prohibits *paying or receiving Money for compounding Differences*.

This is not a Bond for Payment of the *Composition-Money to the Persons Faikney and Richardson had contracted with*; but a Bond for *Richardson's* paying to *Faikney* a *Debt of Honour*, and *reimbursing to Faikney* the Money that *Faikney* had paid upon *Richardson's* Account, to compound the Differences of Contracts wherein they had been jointly concerned: And therefore

therefore it is a good Bond ; and the Plaintiff ought to recover upon it.

Per Cur. unanimously—

JUDGMENT for the PLAINTIFF.

Rex *versus* John Royce.

Monday,
25th May
1767.

THE Defendant had been indicted for a Capital Felony as a Principal in the second Degree, at a Session of Oyer and Terminer holden before the Commissioners under a Special Commission of Oyer and Terminer and Gaol-Delivery for the City and County of the City of Norwich, in December last : for that He and divers other Persons to the Number of One Hundred Persons and more, whose Names are unknown to the Jurors, after the last Day of July 1715, to wit, on the 27th of September 6 G. 3. with Force and Arms, unlawfully riotously and tumultuously did assemble together, to the Disturbance of the Public Peace : and being so assembled together, then and there unlawfully and with Force, feloniously did begin to demolish and pull down a Dwelling-House of Robert Marsh, Robert Harvey, Jeremiah Joes, Robert Rogers, William Offley, Samuel Wigget, Richard Wright, Henry Kitt, Charles Marsh, Nathaniel Roe, Isaac Lillington, and John Woodrow, situate, &c, against the Peace &c, and against the Form of the * Statute in such Case +v. 1 G. 1.
Stat. 2. c. 5.

THE JURY find Him not guilty, as to all the Courts but the second : And as to the second Count, (which is the One above mentioned,) They find that the said John Royce and divers other Persons unknown, to the Number of One Hundred Persons and more, did at the Time and Place in the said second Count charged, with Force and Arms, unlawfully riotously and tumultuously assemble together, to the Disturbance of the Public Peace ; and being so assembled, that divers of the said Persons unknown did then and there, with Force and Arms, unlawfully and with Force feloniously begin to demolish and pull down the Dwelling-House in the said second Court mentioned, in manner and form as in the said second Court is specified : And that at the Time the said Persons unknown so began to demolish the said Dwelling-House, the said John Royce was then and there present, and did then and there encourage and abet the said Persons unknown in beginning to demolish and pull down the said Dwelling-House, by then and there shouting and using Expressions to incite the said Persons unknown so to do.

But the Jury further find, that the said *John Royce* did *not* with Force begin to demolish or pull down, or do any ACT with his OWN HANDS or PERSON for that Purpose, OTHERWISE than as aforesaid.

N. B. The Word "AIDING" was originally inserted in this Special Verdict, but STRUCK OUT by the Judge (Mr. Justice Gould,) who tried the Cause.

On Tuesday the 3d of February last, the Defendant was brought up by *Habeas Corpus*, upon this Special Verdict; when Counsel were assigned to Him, viz. Mr. Cox and Mr. Wallace; and the Monday following (9th February) was appointed for arguing it. In the interim, He was committed to the Marshal.

The Indictment was founded on the Act of 1 G. 1. St. 2. c. 5. and the Question was, "Whether He was a Principal in the second Degree; and as such, ousted of Clergy by this Statute."

According to Appointment, it came on to be argued upon Monday the 9th of February, by Mr. Solicitor General (*Willes*), *pro Rege*; and Mr. Wallace, for the Defendant: And many Cases were cited, (particularly the third Point of the Case of the *Siffingburgh Riot*, in *Hale's Hist. P. C. Vol. 1. p. 463.*) and many Statutes mentioned and argued from, which it would lengthen this Report too much, to specify particularly.

The very short Scope of the Argument had the following Tendency.

For the Prosecutor, it was argued that upon the present Finding, this Man is a Principal in the second Degree. *Accessaries at the Fact*, as They were anciently called, are now considered as Principals in the second Degree. Principals in the second Degree are defined in *Hale's Hist. P. C. Vol. 1. p. 437 and 615.*

But Mr. Justice Foster adds to this Definition, "that in Order to render a Person an Accomplice and a Principal in Felony, He must be aiding and abetting at the Fact, OR ready to afford Assistance, if necessary." And this Man was abetting, and ready to afford Assistance, if necessary. The negative Part of the Finding only shews that he was not a Principal in the first Degree. Enough is found, to shew that he was so in the second: For although *Aiders* and *Abettors* are not particularly named in this Act of Parliament; yet there is enough in it, to shew that They were meant to be included in it; and the Benefit of Clergy is taken from them by it, "the Offenders therein shall be adjudged

" judged Felons, and shall suffer Death as in Case of Felony,
" without Benefit of Clergy."

For the Prisoner, it was urged—1st. That this Statute is restrained to those who *actually commit* the Felony. 2dly. That this Finding does not draw the Defendant within the Description of a *principal Offender in the second Degree*: For, that All Statutes which take away Clergy ought, *in Favorem Vitæ et Privilegii Clericalis*, to be construed literally and strictly. 2 Hale's Hist. P. C. 335.

Now this Man did not *actually assist*: He only encouraged by Expressions to incite them. It does not appear, even that He was *ready to assist* them in *Act*: And it is found negatively, " That He did *not do any Act &c*, with his own " Hands or Person."

In the Course of the Argument, a Case of one *Simms*, at Gloucester Assizes in 1749, upon the Blank Act, for Stabbing a Mare, was mentioned by Lord *Mansfield*, and remembered by Mr. Justice *Aston*; where *Simms* held the Mare by a Handkerchief round her Neck whilst the Other (*Merryweather*) ripped up the Belly. Both were indicted as Principals. The Case was very deliberately considered by the Twelve Judges, (though it was never *argued* before Them by Counsel;) and Eleven Judges thought the Man that held the Mare to be a Felon, and that Clergy was taken away from Him: Mr. Justice *Foster* was of a different Opinion, and continued to be so.

Lord *MANSFIELD* recommended to the Counsel to inquire Whether They could find any Authorities or Precedents of Cases where the Word "*AIDING*" was omitted in a Special Verdict. He observed that "*AIDING*" does not necessarily imply that the Person *actually did* any Thing: The mere Presence may be an aiding; (as in taking a Prize at Sea) The Number of Persons present and inciting *deters* Others from opposing; though the Persons present and inciting may not do any particular and personal *Act* themselves.

RULE—To bring him up on the last Day of the Term.

On that Day, (12th February 1767,) being brought up accordingly—Lord *MANSFIELD* said, There was no Doubt, but that Principals in the first and Principals in the second Degree were All equally *Felons without Benefit of Clergy*.

Before this Statute, they were (for this Offence) All guilty of *Misdemeanours only*; and All equally guilty.

¶ V. Sect. 4. The Act says †, “ Every such Demolishing, or Pulling down, or beginning to demolish, or pull down, shall be adjudged Felony without Benefit of Clergy : and the Offenders therein shall be adjudged Felons, and shall suffer Death as in Case of Felony, without Benefit of Clergy.”

But it leaves the Evidence to the Law : And by Law, they are all equally Actors.

The being Principal in the first, or Principal in the second, Degree, relates to the Priority of Trial.

So there is no Doubt on the Act, but that All are guilty, the Aiders as well as those who perpetrate the Act.

The Acts that take away Clergy turn upon another Point ; viz. Whether they meant to distinguish the Offenders, and single out some as being under more aggravating Circumstances than Others, and deserving more Punishment than the Rest : As in Cases of Rape, Buggery, and other Common Law Offences.

*** Iac. 1. c. 8** So, on the Statute of Stabbing *, (upon which the Case of *The King versus Page and Harwood* was determined, in Style 86.) I have no Doubt but that the Intention of that Statute was to distinguish the Person who actually gave the Stab. His Case differs from the Rest, in Point of Aggravation. Therefore I am clear that the Statute so meant.

+ 8 Eliz. c. 4. The Pickpocket Act † is colourable ; not so strong, nor so clear as that of Stabbing : That may be liable to Doubt. “ *Clam et secrete*” suppose that the Person might not be privy to the private Manner of doing it.

‡ V. Evans In the Case of Robbery in a House † — There was great and Fynche's Reason for || Powell's and § Hawkins's Doubt : And the Legislature thought it necessary to make a new Act.

Car. 473. **upon 39 Eliz. c. 15.** || Q. What Case or Book is here referred to, § V. Hawkins's P. C. Vol. 2. p. 355. to 357.

¶ 9 G. 1. c. 22. But in the Black-Act — The Words are, “ If any Person &c. shall unlawfully and maliciously kill maim or wound any Cattle &c; every Person so offending, being thereof lawfully convicted, shall be adjudged guilty of Felony, and shall suffer Death as in Cases of Felony, without Benefit of Clergy.” And yet in the before-mentioned Case of *Simms*, Mr. Justice Foster had a Doubt whether the Statute did not confine the Offence to the Person killing :

killing: But the other Eleven Judges held the other to be as criminal. And that Determination was right.

Therefore there is no Doubt, if it stood upon *general Reasoning*.

But though We are All clear "that Principals in the second Degree are indictable as Principals;" yet We have great Doubt on this Special Verdict, as to the particular Finding; or, indeed. Whether it finds any Thing material, "at all."

Therefore this Point shall be spoken to on the first Day of next Term.

The Jury can not find *Evidence*: They must find *Facts*.

In the Case of *Messenger, Green, Bedell, and Others*, in *Kelyng* *, it was agreed that a Finding of *All Evidence*, and ^{*V.} *Kelyng*. *No Fact*, was not sufficient; that being aiding and assisting is a Matter of Fact, and ought to be expressly found by the Jury; and that a Verdict which only finds "that the Defendants were present," but finds no particular Act of Force committed by them, is not full enough for the Court to judge upon.

Now I doubt whether this Special Verdict has found any Thing more than being aiding and assisting. What the Jury specially finds is, that he did then and there encourage and "abet by shouting and using Expressions to incite; and not otherwise; not with Force, or by any personal Act." They do not find him ready to assist: Nor do they use any Words to find him aiding and assisting; which are the necessary Words to be inserted in a Verdict, to charge Offenders as Principals in the second Degree. Therefore let it be spoken to, on the first Day of next Term, upon the Question—"WHAT is found by this Special Verdict?"

Mr. Justice ASTON concurred.

They ought to have found him to have been aiding and assisting or, at least, ready to assist.

Hale and *Hawkins*, and all the Writers upon the Subject, and Lord *Coke* in particular, speak of being present, aiding and assisting

Therefore aiding and assisting ought to be expressly found. We ought not to depart from that Precision, which has been required.

Mr

Mr. Justice HEWITT—Upon Consideration, I do not find any Reason for Mr. Justice Foster's Distinction in the Case of *Simms*.

Those that are aiding abetting and assisting are, at *Common Law*, as much Principals as the Actors.

But where a Statute *makes* a Felony ; if the Person is not guilty of Felony so made, He is guilty of Nothing.

Stabbing is a personal Act : So is picking a Pocket. But I have Doubt about the Case of robbing in the House.

Perhaps the Term “*Abetting*” may not be sufficient, without adding “*Aiding and Assisting*.”

ADJOURNED to the first Day of *Easter Term*.

Accordingly, on 6th May 1767, being the first Day of this present *Easter Term*, this Special Verdict was argued a second Time, by Mr. Attorney General (*De Grey*) *pro Rege*, and Mr. Cox, *pro Def.* upon the Point reserved on the last Day of last Term.

Mr. Attorney General argued that the Special Verdict was sufficiently expressed, to affect the Prisoner with the Crime charged upon him.

He is expressly found to have been present ; and to have encouraged and abetted.

In 2 Inst. 182. Lord Coke, in his Comment on *Westm. I. c. 14.* explains the Words “Command, Force, *Aide*, and “Rescetiment : And in speaking of the Word “*AIDE*,” He says “It comprehends all Persons counselling, *abetting*, “plotting, assenting, *consenting* and *encouraging* to do the “Act, and who are *not present when the Act is done* ; (for, “if the Party commanding, furnishing with Weapon, or “aiding, be present when the Fact is done, then is He Principal.”)

In the Case of Murder—If *A* commands *B* to beat *C*, and He beats him so that He dies thereof, it is Murder in *B* : and *A*, if present, is also guilty of the Offence. *Hale H. P. C. Vol. 1. p. 435, 440. Pulton 137. a.*

If any One comes for an unlawful Purpose &c; though He do not act, He is yet a Principal. 1 H. H. P. C. p. 374. 443. and 2 Hawk. 311.

Lord MANSFIELD—Your Principles are admitted. But the Question here is “Whether he did more than “use Expressions to incite.” We are quite clear, with You, that what you mention is EVIDENCE from whence the Jury might have drawn Conclusions. But here, the Word “Aiding” is left out: Which seems to be the technical Term. And the Finding of the Abetting is qualified: For, it is found, negatively, That he did it “no otherwise than by shouting and “using Expressions to incite.”

Mr. Justice HEWITT—The Objection is, That it is not expressly found “that he did aid or assist:” Nor is any Sort of Force shewn to have been used by Him; but the Contrary, “that he did not use Force, or do any Act with his own Hands, &c.”

Mr. ATTORNEY—*Aiding* is not necessary, nor *assisting*. *Abetting* indeed is necessary: But *Consent* alone is sufficient in the present Case.

Here was strong Instigation, by actual Shouting and using Expressions to incite: And it is expressly found “that he did “encourage and abet.”

Minsbieu, and *Cowell*, and *Skinner*, verbo “abet;”—and *Spelman*, and *Du Fresne*, All shew, that *Instigation* alone, without Force, is the Sense of the Word “abet;” and that it is always taken in the *worst* Sense.

Seconds to Duellists are Principals in the second Degree or not, according to the different Designs they come upon. 1 Hale H. P. C. 443, 444.

“ Nullus dicitur Felo principalis, nisi Actor, aut qui prae-sens est abettans, aut auxilians abetrem ad Feloniam faciendam. 3 Inst. 138. And Foster 354. says, “ Persons engaged &c. will not be involved, unless they actually “ aided or abetted.” It is the Mind, not the Act, that constitutes the Offence.

A Servant assisting his Master, but not privy to the Master’s Intention; if the Person, against whom He assists Him, is killed; it is Murder in the Master, because He had Malice forethought; but only Homicide in the Servant. 1 H. H. P. C. 437, 438.

In *Messenger's Case*, 2 St. Tr. 591 —*Green* was holden not guilty; because no particular Act of Force was found against Him; nor that he was aiding or assisting the Rest. So, *Appletree's Case*; and *Bedell's Case*. *Ibid.* Nothing was found that sufficiently charged them.

Indeed it is necessary to find either *Force*, or something contributing to the Guilt. But here is the latter. This was an illegal assembly: The Defendant abetted and encouraged by Shouts and Expressions. The *Mode* of his Abetting is found: And Contributing to the Guilt is implied in the very Idea of abetting. The Result is of Course. The using Expressions to incite comes up to Lord *Hale's* Notion of *abetting*.

Special Verdicts need not be so nice and strict, as either Indictments or Appeals.

Mr. *Cox*, contra, for the Defendant. The present Case depends upon the Distinction between *Aiders*, and mere *Abettors*. In the Cases that have been cited, where the Defendants both aided and abetted, the Distinction was not necessary to be attended to.

This Man can not be considered as a Principal in the second Degree. This Felony is not a *Malum in se*: It was originally a Trespass; and only made Felony, by Act of Parliament.

In much higher Offences, (such as Stabbing,) a Person not guilty of a sufficient Proportion of Guilt shall not be a Principal in the second Degree. So, in privately stealing from the Person.

In this Offence, Nothing less than direct *Aiding* and *Assisting* (expressly found) can make a Man a Principal in the second Degree.

Every Thing shall be taken most favourably for the Prisoner. This is always laid down: And it is particularly so, in the Case of *Regina versus Whistler et al'*. 2 Ld. Raym. 842.

This Offence is little more than a Trespass. The Man did Nothing; It does not even appear that the Expressions of Incitation were heard by the Perpetrators of the Fact. They ought to have shewn that the Mischief was done in Consequence of these Expressions of Incitation.

Aiding and *Assisting* ought to be expressly found.

Abetting

Abetting is only *encouraging*: It may be innocent; for it may be without Effect. Aiding, indeed, can not be innocent: But *abetting* may.

Rex versus Page and Harwood, Style 86. and *Aleyn* 43. 44. is exactly similar to this Case. The Defendants in that Case were only present, and abetting the Person that did the Fact; but used no *Action* towards the Death of the Party: And they were admitted to their Clergy.

But *this Abetting* is confined to “*Shouting* and using “*Expressions* to incite the said Persons so to do”—that is—“to shout:” For Shouting is the last Antecedent.

In the Case of *Messenger and Others*, the “*Aiding and Assisting*” were holden to be essentially requisite to be expressly found as a Fact. *Green* and *Bedell* were discharged; because they were not expressly found to be *aiding and assisting*.

Abetting is less than aiding and assisting. The latter is a Fact which ought to have been expressly found by the Jury, in Order to make this Man a Principal in the second Degree: And no such Fact being found against Him, he ought to be discharged.

Mr. ATTORNEY-GENERAL said that as Mr. *Cox* had not put it upon any new Foot, He would not trouble the Court with a Reply.

Lord MANSFIELD—We'll think of it, and give Notice when We are ready to give our Opinion.

CUR.' *advisare vult.*

On Thursday last, the 14th Instant, Lord MANSFIELD delivered the Resolution of the Court.

The Question intended to be left to the Opinion of the Court upon this Special Verdict, was—“Whether Persons present, aiding and abetting the Others unknown, in beginning to demolish and pull down the Dwelling-House, (who are called Principals in the second Degree) were within this Statute.”

And We are All of Us of Opinion “That they *were*:” And We are All very well satisfied that We were right in our Opinion.

But then a Question was started, “Whether the FACT of aiding or assisting was at all found by this Special Verdict, “as

"as it is worded;" the Words of it going no further than *encouraging and abetting*.

The Doubt arose on what is said in the Case of *Messenger, Green, Bedell, and Others*; and whether the Objections that prevailed in those Cases to the Want of Fulness and Sufficiency in the Verdict, might not prevail in this.

And a Doubt particularly arose on the Omission of expressly adding the Word "aiding:" For, though the Evidence which the Jury states in the Special Verdict were admitted to be sufficient to support such a Finding, if They had gone on to draw the Conclusion; yet this was said to be no more than a Finding of mere Evidence, without drawing a Conclusion from it.

And it was said too, that even the Finding "his being present encouraging and abetting by shouting and using Expressions to incite," was qualified by the negative Finding which follows it, "that he did not with Force begin to demolish or pull down, or do any Act with his own Hands or Person for that Purpose, OTHERWISE than as aforesaid."

Tenderness ought always to prevail in Criminal Cases; so far, at least, as to take Care that a Man may not suffer otherwise than by due Course of Law; nor have any Hardship done him, or Severity exercised upon him, where the Construction may admit of a reasonable Doubt or Difficulty.

But Tenderness does not require such a Construction of Words (perhaps not absolutely and perfectly clear and express,) as would tend to render the Law nugatory and ineffectual, and destroy or evade the very End and Intention of it: Nor does it require of Us, that We should give into such nice and strained critical Objections as are contrary to the true Meaning and Spirit of it.

But however, there being a Doubt raised upon this Special Verdict, We have considered of it, and taken Time to form our Opinion and Determination upon the Validity of the Objections.

And We are All of Opinion that the Verdict is sufficient to find this Man a Principal in the second Degree.

Aiding is an equivocal Term: But *abetting* certainly makes him a Principal in the second Degree.

It is true, that the Word "aided" is not expressly used in this Special Verdict: But it is found "that He was present, and

" and did then and there encourage and abet, by shouting
" and using Expressions to incite."

The Jury have positively found the Conclusion "that He
" did encourage and abet." They have also found how He
encouraged and abetted, *viz.* "by then and there shouting
" and using Expressions to incite the Persons to do the Act."
But this latter Finding *can not vitiate* their former Conclusion—"That He did then and there encourage and abet."

It is objected, That this is *not the Whole* of what They find. For, they find further, "That He did *no Act*
" with his own Hands or Person, for that Purpose, *otherwise*
" than as aforesaid." And it is true, that They have so
gone on, and added this *further* Finding.

But it is also as true, that they have found "That He
" was then and there present, and *did* then and there encou-
rage and abet the said Persons unknown, in beginning to de-
molish and pull down the said Dwelling-House, by then
and there shouting and using Expressions to incite the said
Persons unknown so to do."

Mr. Cox very ingeniously observed, that in Point of Grammar, the Jury have only found him to have abetted "by shouting and using Expressions to incite the said Persons unknown to shout :" For, that "*Shouting*" is the *last Antecedent* to the Words "*so to do.*"

But We are All of Opinion, that there is *really* no Colour for that Construction: It will not hold, either in Regard to the obvious and manifest Sense and Meaning of the Sentence and its Context, or in Point of Grammar.

"So to do"—is "to do *the Act*:" Which Act is, two or three times over in this same Sentence, specified and described to be "beginning to demolish and pull down a Dwelling-House."

This Verdict We hold to be sufficient to find this Man to be a Principal in the second Degree.

The Jury have expressly found, that He *encouraged and abetted* the Offenders, in doing the Criminal Act mentioned in the Indictment: They have found how He encouraged and abetted them; and have specified the particular Circumstances of his doing so. And these Circumstances amount to

to Evidence of it: They are, in Point of Law, Evidence sufficient to prove "That He did encourage and abet them."

Therefore there lies no Objection in Point of Form to the Special Verdict.

He was present, encouraging and abetting Persons unknown, to the number of One Hundred and more, with Force and Arms unlawfully riotously and tumultuously assembled together to the Disturbance of the Public Peace, in feloniously, with Force and Arms, unlawfully and with Force beginning to demolish and pull down a Dwelling-House: And therefore He is a *Principal in the second Degree*.

But it is reasonable that He should have, and therefore let him have Time to consult his Counsel "Whether there can be any Objection taken in Arrest of Judgment."

Whereupon, Mr. Cox desired He might be brought up again on that Day Se'nnight.

A RULE was made accordingly.

Being now brought to the Bar Mr. Solicitor General (Willes) prayed Judgment against him.

Mr. Cox and Mr. Wallace for the Defendant, mentioned some Objections to the Record, in Arrest of Judgment.

1st, The Commission of *Gaol-Delivery*, as set out, does not shew that Mr. Justice HEWITT (before whom he was tried,) was of the *Quorum*: It does not specify Him by Name. In the Commission of *Oyer and Terminer*, it is stated "that He was of the *Quorum*:" But the Commission of *Gaol-Delivery* does not shew it.

2d Objection. Here does not appear to have been *any Issue joined*: But immediately after the Plea of Not guilty, and without any Issue joined, Proces is awarded. In *Mackallye's Case*, 9 Rep. 63. a. (which was at a Session of Gaol-Delivery at the Old Bailey,) Issue is joined upon the Record. [But They owned it to be the *Practice*, that Issue does not, in such Cases, use to appear upon the Record, to have been joined; nor is it the Practice at the Old Bailey.]

3d Objection.—The Justices of *Gaol-Delivery* are only said to be "*assigned* to deliver the *Gaol*:" But it does not shew by whom They were assigned; neither does it say that

James

James Hewitt Esq; was *One of Them.* And yet the Statute of 27 H. 8 c. 24. § 2. requires that Justices of Gaol-Delivery shall be made under the Great Seal: And in Hob. 139. They are called the *King's Justices.* Here, They are neither said to be by *Letters Patent,* or to be Justices "of our Lord the "King," assigned: Which is the least that ought to have been said in the Description of Them.

4th Objection.—The Court can not pass a Judgment upon *this Man*; because the Record is *incomplete:* For the Jury are charged to inquire against *Three*, and Three have pleaded Not guilty; but it does not at all appear *what is become* of the *Other Two.* It ought to have appeared upon this Record, whether they were convicted or acquitted; and what has been done upon those Indictments. In *Yelv.* 106. *Drury versus Dennis,* in Trespass against *Baron and Feme,* for beating the Plaintiff's Mare; The Jury found "That the Wife beat "it."—This was holden to be an imperfect Verdict; the Husband being neither acquitted nor condemned.

Mr. Attorney and Mr. Solicitor General, contra, answered all these Objections: But it is needless to report them; because—

THE COURT were clear there were no Grounds for any of them.

1st. It is not necessary to *set out* the Commission of Gaol-Delivery at large: It is mere Matter of Description. In the Commission of *Oyer and Terminer* it is "of Whom our said "Lord the King wills that the said Sir Henry Gould or James "Hewitt Esq. shall be One."

2d. Joining Issue is not usual or necessary for it to appear upon the Record, in Cases of this Kind, at a Session of *Oyer and Terminer.* And upon a Commission of Gaol-Delivery, which is a Proceeding *Ore tenus, and infra ter,* no Issue is joined*. The Defendant says—"I am not guilty: There- "fore let me out of Prison." And if he is not found guilty, He is to be delivered out of Prison.

Tremaine's Entries; particularly Tremaine's Entries 286, 287. *Rex v. Doughty et al.* where the want of joining Issue is assigned for Error (upon an Indictment at a Sessions of the Peace and Oyer and Terminer at Hicks's-Hall;) Yet the old Practice has continued ever since. In Purchale's Case, 9 Ann. at a Session of Oyer and Terminer at the Old Bailey, it appears by the State Trials, Vol. 8. p. 286, 287. that upon the Record, no Issue is joined; And Yet no Exception was taken.

3d. It sufficiently appears, upon the whole Record, that They are the *King's Justices:* And They can be assigned by Nobody but the King.

4th. There

* See Raf-
tall's En-
tries,
Coke's En-
tries, Tre-

4th. There was no Need to take any Notice of the other Two. The *Certiorari* only requires the Return of the Indictment and Special Verdict as to *this Man*: The Record is complete, as far as the Requisition of the Writ of *Certiorari* goes. The Cases of Each are *several*. He is not charged as an *Accessary*. Then indeed, it might have been a different Case: But the Cases of *these Defendants* are *distinct* and *separate*. Therefore it was not necessary to return what was done as to the Rest; or to take any Notice of them.

WHEREUPON—

The Defendant being first asked “What he had to say “ why Judgment should not be pronounced upon Him and “ Sentence awarded against him ;”

Mr. Justice YATES, the second Judge of the Court, (after a very proper Expostulation with the Defendant, to convince him of the Enormity of his Crime, and a very serious and pathetic Exhortation to Repentance, as he could have but small or no Hope of Mercy,) .

PRONOUNCED SENTENCE OF DEATH upon him.

Lord MANSFIELD then asked Mr. Attorney-General “ what He had to pray, as to the Time and Place of “ Execution :”

Who answered, that He had Nothing particular to pray, as to either.

* He never
was executed;
neither
was He par-
doned; He
died in the
King's
Bench Pri-
son, in
Feb. 1771.

† Tis in
1 Stra. 553.

Whereupon, *per Cur'*.—

A RULE was made for his * Execution on this Day Fort'night, at (the † usual Place) St. Thomas a Watering's, in Surrey.

† N. B. He was in Custody of the Marshal of this Court; In which Case, this is the usual Place of Execution. See the † Case of the two Athoes, (Father and Son,) P. 9 G. 1. Who were executed there; though it is said, in a Book commonly called 8 Mod. (p. 146.) “ that they were executed at the common Gallows in the County of Surrey.”

Rex *versus* Mayor and Aldermen of Leicester. Wednesday
27th May

UPON a Mandamus to restore One *James Sisney* to *1767.*
the Office of an Alderman of the Borough of *Leicester*.

The Defendants returned for Cause of Removal—That the said *James Sisney*, after He was elected placed and sworn into the said Office, and before Amotion of Him from it, that is to say, on the *1st of May 1766*, DEPARTED, *with his Family, from the Borough of Leicester aforesaid and the Liberties thereof, and ENTIRELY left the same, with an INTENT to reside inhabit and dwell, with his Family, for the future, elsewhere;* and from thence, and until and at the Time of the Amotion of Him, *did continually abide reside inhabit and dwell, with his Family, out of the said Borough and the Liberties thereof, contrary to the Duty of his Office aforesaid, To the great Injury and Damage of the Mayor Bailiffs and Burgesses of the said Borough.*

They then return, That on the *10th of September 1766*, *Joseph Chambers*, then Mayor of the said Borough, and the major Part of the Aldermen of the said Borough for the Time being in DUE Manner met and assembled at the *Guild-Hall* of and within the said Borough, concerning divers Matters and Businesses relating to the said Borough and the good Regulation and Government thereof: Of and to which said Meeting or Assembly, due and reasonable Notice and Summons was previously sent to All the Aldermen of the said Borough for the Time being, resident or being within the said Borough and the Liberties thereof, in Order that They might attend at the said Meeting or Assembly.

They further return, That at the said Meeting or Assembly, a Charge and Information was made and given to the said Mayor and Aldermen so Assembled, against the said *James Sisney*, “ of his having departed from and left the said Borough and the Liberties thereof as aforesaid, and of his abiding residing and dwelling OUT OF the said Borough and the Liberties thereof as aforesaid, contrary to the Duty of his said Office, and to the great Damage of the said Mayor Bailiffs and Burgesses of the said Borough,” as a reasonable Cause for the Removal of the said *James Sisney* from his said Office.

WHEREUPON the Mayor, and major Part of the Aldermen of the said Borough so then and there assembled as aforesaid, did then and there duly discharge and remove Him the said *James Sisney* from the said Place or Office of One of the Aldermen

dermen of the said Borough, FOR THE CAUSE AFORESAID: And by Reason thereof, He hath ever since remained, and still is and continues removed and discharged therefrom. And thereupon They can not restore Him &c, as by the Writ They are commanded.

Mr. Walker, for the Prosecutor, objected to this Return, as being insufficient.

1st. The Corporate Meeting is only returned to be assembled " upon due Notice :" Whereas there ought to have been particular Notice ; as it was not upon a Charter-Day:

2d. No Notice was given to the Person removed of any Charge upon Him.

3d. Non constat that the Corporate Body heard the Charge, or determined upon it ; or that it was determined at all.

4th. Consequently, the Amotion of this Gentleman was irregular.

5th. No Neglect of Duty is charged ; only that He absented Himself from the Borough.

Mr. Hill, contra, for the Corporation.

1st. It is stated particularly, that He and his Family *totally* left the Borough without Intention to return ; and had been so absent, above a Year *. This is a good Cause of Amotion. It is expressly stated " That All the Corporation (the 10th Sep- tember) had Notice of a Corporate Meeting " to do the Business of the Corporation." It is not necessary to specify the particular Business to be done. It would be extremely inconvenient, if it were holden necessary that every Corporation must have particular specific Notice of every single Business that might occur : A Notice to each Member, " to meet to do the Business of the Corporation," is sufficient. Mr. Justice Eyre's Opinion is so, in the Case of *Rex versus Corporation of Carlisle* [See 1 Strange 315 :] And it was not contradicted by the Rest of the Court.

2d. *Regina versus Truebody*, 2 Ld. Raym. 1275. is in Point—that if a capital Burges leaves the Borough *totally*, there is no Need of Notice to Him.

5th. In the Case of *Vaughan versus Lewis*, *Caribew* 227. His Chief Justice held that the not inhabiting within the Borough is a good Cause of Removal. *The City of Exeter versus*

versus Glide, 4 Mod. 33. Holt's Rep. 169. and 12 Mod. 37.
S. C. [See also *Rex versus Mayor &c of Newcastle*, (Mr. Fetherstonhaugh's Case), Hil. 1746, and Mich. 1747. 21 G 2. B. R.]

Lord MANSFIELD—This Man had NOT totally left the Borough. There is no Pretence to support this Return : He was only absent about four Months.

Mr. Justice YATES concurred. The Cause just now cited out of Lord Raymond is in Point against the Return *. * The How can the Corporation know his Intention ? How did Words are They know " that He did not intend to return ?" He might — " Other- have altered his Intention.

Lord MANSFIELD—But They have never asked rough a Him : They have given Him no Notice of the Charge. There " While, " for his " Heath's " Sake " &c."

Per Cur'.

RETURN disallowed : And a PEREMPTORY
MANDAMUS ordered.

RESTORATION-DAY : Only One Judge came down. It Friday 29th is not usual that any Business is done upon this Anniversary. May 1767.

But this being the last Common Paper-Day, the One Judge went through the Paper : Otherwise the Parties could not have had their Judgments within this Term.

Rex *versus* William Davis Phillips Esq. Mayor ^{Satur. 30th} _{May 1767.}
of Plymouth.

M R. Attorney General (*De Grey*) moved for a Rule to be made upon the Defendant, to shew Cause why an Information should not be granted against Him, " for certain Misdemeanours in his Office as a Justice of Peace of and for the Borough of Plymouth, and for the illegal and false Imprisonment of *Hugh Smart, William Puckey, and George Lemon*, being Officers of His Majesty's Customs, and in the due Execution and Discharge of their Office." (These were the Words of the Notice of Motion given to the Justice.)

After Mr. Attorney General had opened the Case—

Lord MANSFIELD asked Him, "On whose Behalf
"He moved this."

Mr. Attorney declared that He moved it on Behalf of the CROWN.

Whereupon—

LORD MANSFIELD rejected the Motion; declaring that He would never grant a Motion for an Information applied for by the Attorney General on Behalf of the CROWN: because the Attorney General has Himself Power to grant it, if He judges it to be a proper Case for an Information: and it would be a strange Thing for the Court to direct their Officer to sign an Information which the Attorney General might sign Himself, if He thought proper: And if He did not think it a proper Case, it would equally be a Reason why the Court should not intermeddle. If the Attorney General should have any Doubt about the Propriety of it, He might send to the Magistrate complained against, to shew Him Cause why He should not grant it.

He said, that He had rejected such a Motion two or three Times, since He came into this Court: It was once denied to Sir Fletcher Norton, when He was Attorney General *; and once, before that; and He would never grant it, because it was the proper Province, of the King's Attorney General to do it Himself, instead of applying to this Court for their Leave to do it.

* V. ante,
p. 1565.

Mr. De Grey said, It was out of Respect to the Court, that the Application was made to the Court, instead of using his own Power of doing it Himself.

Lord MANSFIELD—If it appears to the King's Attorney General to be right to grant an Information, He may do it Himself: If He does not think it so, He can not expect us to do it.

MOTION DENIED.

Rex versus The Inhabitants of Harrow.

THIS was an Indictment for not repairing a Highway.

The INDICTMENT sets forth, That from Time to Time whereof the Memory of Man is not to the Contrary, there was

was and yet is a certain ancient and common King's Highway leading from the HAMLET of Roxeth in the Parish of Harrow in the County of Middlesex, towards and unto the ancient Market Town of Brentford in the County aforesaid, used for the liege Subjects of our said Lord the King and his Predecessors, with their Horses Coaches Carts and Carriages, to go return pass ride and labour at their Will and Pleasure; and that a CERTAIN PART of the said King's Highway, situate lying and being IN THE PARISH OF HARROW AFORE-SAID in the said County of Middlesex, leading from Roxeth-Place House IN the said HAMLET of Roxeth, unto a certain Place called the Stroud Gate in the same Hamlet, in the said Parish of Harrow, containing in Length Forty Poles and in Breadth eighteen Feet, on the 29th Day of November, in the sixth Year of the Reign of our Sovereign Lord George the Third now King of Great-Britain, and so forth, and continually from thence until the Day of the taking this Inquisition, at the Parish of Harrow aforesaid was and yet is very ruinous miry deep and in such Decay, for Want of due Reparation and Amendment of the same, so that the liege Subjects of our said Lord the King could not during the Time aforesaid nor yet can there go return pass ride and labour with their Horses Coaches Carts and Carriages, as they used and still ought to do, without greater Danger of their Lives and Loss of their Goods; to the great Damage and common Nusance of all the liege Subjects of our said Lord the King through the same Way going returning passing riding and labouring, and against the Peace of our said Lord the King his Crown and Dignity: and that the Inhabitants of the said Parish of Harrow the Common Highway aforesaid, being in Decay and out of Repair, of Right ought to repair and amend, when and so often as it shall be necessary.

On Monday the 11th of this Month of May 1767, a Motion was made, on Behalf of the Defendants, in Arrest of Judgment: And a Rule to shew Cause.

The Objections were—1st. That It is laid as a King's Highway leading from a HAMLET: But a Hamlet is less than a Vill, or Town. It ought to be laid as leading from one Town to another. *Palin. 389. Bole's Case, and 1 Hawk. P. C. c. 76. p. 201. § 1.*

2d Objection. This is an Indictment for not repairing a Road leading from the Hamlet of Roxeth to the Town of Brentford: Yet it describes the defective Part as being Part of a Road leading from Roxeth-Place House IN the Hamlet of Roxeth, to the Town of Brentford. Therefore the Hamlet itself is excluded, by the former Expression of "leading

* N. B. P. "from it : But the latter Description includes it, or, at least; 78. is mis-*Part* of it. 2 *Rol. Ab.* Title Indictment, Letter M. pl. printed for 19. is in Point, as they said. 81.

THE COURT over-ruled the Objections.

They held it sufficiently described by saying "that it led "from a Hamlet :" And they saw no Inconsistency in the Description of the Part out of Repair.

It was observed that the *Place out of Repair* is not described to be IN the Hamlet. The Objection proceeds wholly upon a Mistake. The Indictment does not say "that the PART "of the Way which is *out of Repair* is IN the Hamlet of Roxeth :" It says that it is "in the Parish of Harrow." The Place where they take up the Road from its Beginning, is indeed described to be in the Hamlet ; and so is the Place where they leave it : But it may go through other Parts and Places which are not within the Hamlet. It does not follow, that because the Beginning is in the Hamlet, and the End in the Hamlet, therefore no intermediate Part of it can be out of the Hamlet.

The Hamlet of Roxeth is excluded, even upon the very Principles insisted on by the Counsel for the Defendants. For, the Words *from Roxeth-Place House to Stroud-Gate*, which are Both of them in the Hamlet, exclude both those Places ; and, consequently, exclude the Hamlet in which they are situated. So that here is no Inconsistency or Repugnancy upon the Face of the Record.

Per Cur'. unanimously—

RULE DISCHARGED.

Monday 1st Beckwith Esq. versus Shordike and Hatch.
June 1767:

THIS was an Action of Trespass for entering the Plaintiff's Close, with Guns and Dogs ; and killing the Plaintiff's Deer. The Defendants pleaded " Not guilty :" And a Verdict was found for the Plaintiff, with 30s. Damages.

A Motion had been made, on Behalf of the Defendants, for a New Trial ; as the Judge who tried the Cause (Mr. Baron Adams) was of Opinion that the Jury ought not to have found the Defendants guilty ; it being an Accident that happened without their Intention, and contrary to their Inclination.

Upon

Upon shewing Cause against a New Trial, Mr. Serjeant *Whitaker* argued on Behalf of the Plaintiff; and Sir *Fletcher Norton* on Behalf of the Defendants.

Upon the Baron's Report of the Trial and Evidence, so far as it related to a New Trial, it did not appear that the Baron had *directed* the Jury to find for the Defendants; though it was his *Opinion* "that They should have done so."

THE COURT thought that in Cases of this Nature, it must depend very much upon the *particular Circumstances* appearing in Evidence, "Whether the Persons who owned "the Dogs which, *in their Company*, did the Mischief, "were or were not Trespassers." In the present Case, the two Defendants entered, with Guns and Dogs, into a Close of the Plaintiff's adjoining to his Paddock: And their Dog pulled down and killed One of the Plaintiff's Deer. They have pleaded "Not guilty," to the Trespass: And upon *this Plea* of "Not guilty," this was *sufficient* Evidence to prove them Trespassers. They were not going along a Foot-Path; and their Dog happened to escape from them, and run into the Paddock and pulled down the Deer against their Will, (which Sir *Fletcher Norton* had represented the Fact to have been;) nor was it another Person's Dog, that followed them by Chance, (which had been also represented to have been the Fact; though neither of these Representations were verified by the Judge's Report:) But it was their *own* Dog; and They having these Dogs and Guns with them, were in the Plaintiff's Close, and *not* in a Foot-Path. The Jury therefore, who were to judge "*quo animo* They "entered the Plaintiff's Close," considered it as an *intentional Trespass*, and not as a mere involuntary Accident: And the Judge, though He might *think* otherwise, *did not direct* them which Way to find their Verdict; but left it to Them.

Lord *MANSFIELD* added, that the Damages were so small, that it was not worth While to set the Verdict aside upon Payment of Costs, and put the Parties to the Expence of a New Trial: The Play would not be worth the Candle.

Mr. Justice *YATES* answered an Objection of Sir *Fletcher Norton's*, "That the proper Action would have been "for keeping a Dog *used* to bite and run down Deer &c;" by saying, that it might not have been in the Plaintiff's *Power to prove that*: It might probably be a Dog that the Plaintiff was an entire Stranger to. The Dog belonged to the Defendants: And it would be too hard to put this Proof of his ill Qualities upon the Plaintiff.

Mr.

Mr. Justice ASTON mentioned a Case apposite to this Subject; as it turned upon the Distinction between *voluntary* and *involuntary* Trespasses. It is reported in the Additions to Lord Chief Justice Popham's Reports: It is in page 161. *Millen versus Fandye*—The Defendant, with a little Dog, chased the Plaintiff's Sheep out of his Ground (where they were trespassing;) and drove them off his own Ground. They went into another Man's Ground, which had no Hedge to divide it from the Defendant's Grounds, which were contiguous. The Dog pursued them into the other Man's Land, so next adjoining. The Defendant, as soon as the Sheep were out of the Defendant's own Land, called in his Dog, and chid him. The Owner of the Sheep brought an Action of Trespass, for chasing his Sheep. The Court gave Judgment “*quod Querens nil capiat per Billam;*” being of Opinion “that Trespass lay not in that Case:” For, They held it to be an *involuntary* Trespass; whereas a Trespass that may not be justified, ought to be done *voluntarily*. They thought He might lawfully drive the Sheep out of his own Land, with his Dog; and He did his best Endeavour to recall the Dog, when they were driven out of it: But the Nature of a Dog is such, that he could not be recalled and withdrawn suddenly and in an Instant. Therefore Trespass did not lie against him for what He had done.

But the present Case can't be considered as an accidental *in-voluntary* Trespass.

The RULE to shew Cause “Why the Verdict should “not be set aside, and a New Trial granted,” was DISCHARGED.

The End of Easter Term 1767, 7 G. 3.

Trinity Term

7 Geo. 3. B. R. 1767.

Rex *versus* James Owen als'. Dovaston.

Monday 22d
June 1767.

THE Defendant was brought into Court, upon the Return of a Writ of *Habeas Corpus* directed to the Sheriff of *Shropshire* and also to the Keeper of the Goal of and for the said County. They return a Commitment to and Detainer in the King's Prison, under their Custody, on 3d May last by Virtue of a certain Attachment or Commitment under the Hands and Seals of *Thomas Trevor* and *William Roberts* Two of His Majesty's Justices of the Peace for said County of *Salop*: Which said Attachment or Commitment is in the Words and Figures following: To all Constables Thirdboroughs and Other His Majesty's Officers in the County of *Salop*, and also to the Keeper of His Majesty's Gaol for the said County — *Shropshire*, to wit, Whereas the Worshipful *Richard Smalbroke* Doctor of Laws, Vicar General and Official Principal of the Right Reverend Father in God *Frederick* by Divine Permission Bishop of *Lichfield* and *Coventry* and of his Episcopal Consistory Court of *Lichfield* lawfully constituted, hath certified to Us, Two of his Majesty's Justices of the Peace for the said County of *Salop*, under the Seal of his Office, That *James Owen* otherwise *Dovaston*, of the Parish of *Westfelton* in the County of *Salop* and Diocese of *Lichfield* and *Coventry*, hath disobeyed and contemned the Proclams and Proceedings of the Ecclesiastical Court of *Lichfield* in not appearing before Him his Surrogate or other competent Judge in that Behalf, on a certain Day Time and Place duly appointed for his said Appearance, (and of which, personal Notice was given to Him,) to answer the Reverend *Joseph Dixon* Clerk, Rector of the Rectory and Parish-Church of *Westfelton* aforesaid, in a certain Cause of Subtraction or Non-Payment of Tithes AND other Ecclesiastical Rights and Emoluments, promoted by the said *Joseph Dixon* Clerk, against Him the said *James Owen*

Owen otherwise Dovaston; and bath desired our Aid and Assistance for the ordering and reforming the said Person, according to the Statute of 27 H. 8. c. 20. in that Case made and provided, and confirmed by a Statute of 2 & 3 Ed. 6. c. 13. These are Therefore in His Majesty's Name, by Virtue of the said Statute, to will and require you or Some of you, that you forthwith attach or cause to be attached the Body of the said James Owen otherwise Dovaston, and Him deliver to the Keeper of His Majesty's Gaol for the said County of Salop, there to remain without Bail or Mainprise, UNTIL he shall have found sufficient Surety, to be bound by Recognizance or otherwise before Us or Some other Justice of the said County, to the Use of our Sovereign Lord the King, to GIVE DUE OBEDIENCE to the Process Proceedings Degrees and Sentences of the Ecclesiastical Court of Lichfield aforesaid. Hereof fail not, at your Peril. Given under our Hands and Seals, the first Day of May &c., &c., &c.

Sir Fletcher Norton and Mr. Ahurst on Behalf of the Defendant, insisted that this Commitment was illegal; and took several Objections to it.

1st Objection. It professes to be grounded on 27 H. 8. c. *V. Sect. 1. 20*. which Statute is confirmed and enlarged by 2 & 3 Ed. IV. Sect. 13. 6. c. 13 †. And 32 H. 8. c. 7 †. being made in pari materia, must be taken in. The "Contempt, Contumacy, or Disobedience," mentioned in the first of these Statutes is explained by the second and third of them, to be a Contempt or Contumacy, or Disobedience AFTER Sentence. V. 32 H. c. 7, § 4. and 2 & 3 Ed. 6. c. 13. § 13.

There never was an Instance in the Ecclesiastical Court of a Proceeding in this Way, upon what may be called mesne Process. Their Method is, to decree against the Person; and, after Sentence, to excommunicate for Contumacy in not obeying the Sentence: And if He remains excommunicate 40 Days after Publication, a Writ de excommunicato capiendo is awarded against Him.

There is no Instance in this Court, of such a Proceeding upon the 27 H. 8. c. 20. as this is. None of the Officers of the Court remember such a Return to a *Habeas Corpus*. And it appears by the 4th Section of that Act, that it was only meant to be temporary.

The Case of *Rex versus Sanchee and Others, Quakers,*
 || See also 12 reported in Ld. Raym. 323 || and other Books, was argued
 Mod. 165. upon different Principles: It was argued that the Jurisdiction
 and Holt of the Spiritual Court was taken away by 7 & 8 W. 3. c. 34.
 657. S. C. That
 Hil. 9 W. 3.

That Case shews that there *has* been a Proceeding upon this Act, so lately as in King William's Time: and 27 H. 8. c. 20. was then considered, as being in Force. Yet in that Case, the Statutes of 32 H. 8. and 2 & 3 Ed. 6. were not taken into Consideration.

If this Method be legal, no Writ *de excommunicato capiendo* will ever be applied for. If They can do it in this summary Way, they need not stay 40 Days required by 2 & 3 Ed. 6. c. 13. § 13.

They observed, That Dr. Burn, in his Ecclesiastical Law, Vol. 2. p. 446. (under the Words of 27 H. 8. c. 20. " shall have Power to attach,") refers to the Case of *Rex versus Sanchez*, in 1 Ld. Raym. 323; but seems to have found no other Case of the same Kind.

2d Objection to the Legality of the Commitment.—The Information ought to have been *upon Oath*. A Man ought not to be deprived of his Liberty, without an Oath: Whereas this Commitment is founded upon the *mere Certificate* of the Ecclesiastical Judge.

3d Objection.—Upon a Writ *de excommunicato capiendo*, they must shew precisely, "that the Ecclesiastical Court have Jurisdiction." Now this Suit is only alledged to be for Tithes, AND OTHER Ecclesiastical Dues: Which, they said, is not sufficient; and cited 1 Ld. Raym. 323. the Case of the Quakers before-mentioned.

4th Objection.—The Justices ought to *have convened* the Party before them, in Order to have afforded him an Opportunity of giving Security: But, instead of that, He was carried directly to Prison, without being permitted to give Bail, (which they said, was offered.)

5th Objection.—The Certificate is improper, for Want of reciting "that the Bishop was out of the Diocese:" For, otherwise the Certificate ought to have been *by the Bishop*.

6th Objection.—The Certificate does not import to be a *Request*. The Jurisdiction of the Justices can not vest, without an Information AND Request: Both are necessary. And no Requisition shall be *presumed*. The Certificate goes no further than that the Man did not appear.

Mr. MORTON, *contra*, had begun to answer these Objections—But

Lord MANSFIELD declared Himself to be very clear upon this Matter.

The Statute of 27 H. 8. is *not repealed*. That Statute and the Statutes of 32 H. 8. and 2 & 3 Ed. 6. are *diverso iure uitio*: The latter do not mean to repeal the former.

The Officers of this Court not remembering any Instance in this Court of such a Return to a Writ of *Habeas Corpus*, is nothing at all. It is probable that the Person attached always gave Bail, whenever any such Case happened; and did not apply for a *Habeas Corpus*, at all.

As to Proceedings in the Ecclesiastical Court—There is no Reason to complain of the Manner in which the Persons who claim the Tithes, have proceeded. They have chosen the easier quicker and cheaper Method, instead of taking that which was the most vexatious, dilatory and expensive.

If the Statute of 27 H. 8. is not repealed, then consider what is the Construction of it. The Contempt is in Non-Appearance to the Suit instituted in the Ecclesiastical Court. The Ecclesiastical Judge has certified this, under his Seal of Office; and hath desired the Aid and Assistance of the Justices.

It is objected that here is no Information on Oath—But why is there Need of an Information upon Oath of the Proceeding of a Court? The Ecclesiastical Court are to make Information and Request: And then They are to have this Assistance from the Justices.

As to the Form—It is “ In a certain Cause of Subtraction “ or Non-Payment of Tithes AND other Ecclesiastical Rights “ and Emoluments.” This is said to be an *Uncertainty* in the Demand: And that it *may* perhaps be a Suit for Demands *not within the Jurisdiction* of the Ecclesiastical Court.

In *Rex versus Sacheverell*, reported in 1 Ld. Raym. 323. the Court were in the Right, to lay hold of the nicest Objections, in a Case circumstanced as that Case was. But there, it was expressed in the *Disjunctive*, “ Tithes or other Ecclesiastical Duties:” This is, “ Tithes AND other.” So that it clearly appears that the Ecclesiastical Court *had Jurisdiction in the present Case, as to the Tithes.*

This seems a much better easier and shorter Method than the Other. This is only a bailable Process, to appear and submit

submit to the Jurisdiction. It is a Demand of a few Shillings. And the Man is no Quaker.

Therefore this Man ought to be admitted to Bail.

Mr. Justice YATES concurred. As to Information *and* Request being Both of them requisite—Here, the Justices acted merely *ministerially*. The contumacious Person is to be attached, and to remain in Ward till He shall have found sufficient Security. The Act of 27 H. 8. c. 20. ought to be taken disjunctively—“Information or Request.” This Act relates only to *mesne Proces*: And though the first Words are, “make Information and Request;” yet in *two subsequent* Parts of it, the Words are, “such Information OR Request.” in the Disjunctive.

This is a much shorter easier and better Method of Proceeding, than that of Excommunication: It does not harass and oppress; but only requires giving Security.

Here is an *express Request* stated upon this Return: Though, perhaps, the Ecclesiastical Judge's mere sending the Certificate might well enough be considered *as a Request* to give the Aid and Assistance directed by the Statute.

It lay upon the Party attached, to *offer* his Bail; if He had a Mind to give any.

Most clearly, the Commitment is *legal*: The Man must give Bail.

Mr. Justice ASTON fully concurred *in omnibus*, for the Reasons already given. And as to the Continuance of the Act of 27 H. 8. The Statute of 2 & 3 Ed. 6. express. ly says *—“That not only the said Acts made in the said * See the 27th and 32d Years of the Reign of the said late King H. Preamble 8. concerning the true Payment of Tithes, and every Ar- of it. ticle and Branch therein contained, shall abide and stand in their full Strength and Virtue: But also—Be it further enacted &c.”

Mr. Justice HEWITT expressed some Doubt. He thought, the Statute of 32 H. 8. seems to mean to give the same Remedy to *Lay-Impropriators*, as 27 H. 8. gave to *Ecclesiastical Persons*. Therefore it seems constructive of 27 H. 8: And consequently, they should be both construed alike.

The Statute of 2 & 3 Ed. 6. § 13. says, that Suits for with-holding Tithes shall be in the Spiritual Courts only; and gives

gives Them Power to excommunicate, after Sentence, for not obeying their Sentence.

But 32 H. 8. does not give the same Remedy as 27 H. 8. does; unless the former be construed agreeably to the latter: Which latter expressly says, that "AFTER definitive Sentence," such Application may be made to the Justices (§ 4.)

Therefore He had some Doubt "Whether this is a proper Proceeding under the 27 H. 8." as it is before a definitive Sentence.

He remarked also, that it did not very clearly appear "that the Parties dwelt in the County." Whereas the 27 H. 8. gives the Jurisdiction only to "two Justices of the Peace of the Shire where the Offender dwelleth."

Again, The Suit is only, generally, "for Subtraction of Tithes:" But it does not appear that these Tithes arise WITHIN the Parish, or were due to Joseph Dixon, as the Rector of it. Whereas the Power of convening the Offender before the Ordinary is given to the Parson Vicar Curate or other Party aggrieved: and, consequently, so also is the Remedy annexed to it; viz. the Demanding the Aid of the Justices of Peace.

Therefore He was not fully satisfied that the Proceeding was to be defended under 27 H. 8. and wished it might be further considered.

THE COURT, thereupon, were about to order it to stand over, upon Mr. Justice Hewitt's Doubts.

But Sir Fletcher Norton chose to give Bail, now; rather than risk being too late for a Motion which he intended to make against the Justices, for the Manner of their acting in this Affair.

A RECOGNIZANCE was accordingly taken from the Defendant with two Sureties, agreeable to the Requisition of the Statute: The Principal, being bound in 5*l*; and each Surety in 50*s*. (the Value of the Tithe being very small, not exceeding 15*s*.)

WHEREUPON the Defendant was DISCHARGED out of CUSTODY.

Clayton, the Younger, *versus* Andrews.

Tuesday
23d June
1767.

ASSUMPSIT, for Non-Performance of a Contract for Sale of Corn. "Non *assumpsit*," pleaded. On a Trial at *Suffex-Assizes*, a Verdict was found for the Plaintiff; subject to the Opinion of this Court, upon the following Cause and Question.

The Defendant, on 13th October 1766, agreed to deliver One Load and an Half of Wheat to the Plaintiff, within three Weeks or a Month from the said Agreement, at the Rate of twelve Guineas a Load, TO BE PAID on Delivery: Which Wheat was understood, by both Parties, to be at that Time unthreshed. No Part of the said Wheat so sold was delivered; nor any Money paid by Way of Earnest for the same; nor any Memorandum thereof made in Writing. And "Whether this Agreement be within the Statute of Frauds," is the Question. V. 29 C. 2. c. 3. § 17. which enacts "that no Contract for the Sale of any Goods Wares or Merchandizes, for the Price of 10l. Sterling or upwards, shall be allowed to be good; except the Buyer shall accept Part of the Goods so sold, and actually receive the same; or give something in Earnest; or that some Note or Memorandum of it in Writing be made and signed."

[Mr. Baron Smythe, who tried the Cause, thought this Cause to be like that of *Towers versus Sir John Osborne*, in 1 Strange 506.]

Lord MANSFIELD directed the Counsel for the Defendant to begin.

Mr. Burrell, for the Defendant, having finished what He had to say—

Mr. Harvey was beginning for the Plaintiff: When

Lord MANSFIELD stopt Him; saying the Cause was clear: That Cause in 1 Str. 506. of *Towers versus Sir John Osborne*, Hil. 8 G. 1. at Guild-Hall, before Pratt, Chief Justice, is directly in Point. There, the Defendant bespoke a Chariot: and when it was made, refused to take it. And in an Action for the Value, it was objected, that they should prove Something given in Earnest, or a Note in Writing; since there was no Delivery of any Part of the Goods. But the Chief Justice ruled it, not to be a Cause within the Statute of Frauds; which relates only to Contracts for the actual Sale of Goods, where the Buyer is immediately answerable,

swerable, without Time given him by special Agreement, and the Seller is to deliver the Goods *immediately*.

Mr. Justice YATES—That Clause of the Statute relates only to *executed Contracts*. Here, Wheat was sold; to be delivered at a *future Time*. it was *unbrought* at the Time when the Contract was made: Therefore it could not be delivered at *that Time*. The Case mentioned out of Sir John Strange is in Point.

Mr. Justice ASTON concurred; and added, that the Case in 1 Str. 506. has always been considered as an Authority in Point, upon Questions of this Kind.

Per Cur. unanimously—

ORDERED that the Postea be delivered to the Plaintiff or his Attorney.

Rex *versus* Justices of Cornwall.

A MOTION was made by Sir Fletcher Norton, Mr. Dunning, and Mr. Lucas, to quash an Order of the Quarter-Sessions of the County of Cornwall, made for quashing a Rate made for the Relief of the Poor of the Borough of St. Ives in that County.

But, on being asked “what was their *Objection* to the “Order of Sessions;” They could only assert “that the “Original Rate was a good Rate, and *ought not* to have “been quashed:” But they complained that by the Conduct of the Justices at Sessions, they were precluded from taking any *particular Exceptions* to the Order of Sessions; in as much as the Sessions had only quashed the Rate *in general*, without giving any Reason at all *why* They did so, or even bearing any Objections that could have been made to it.

THE COURT were unanimously of Opinion, that They could not be let in, to make a Motion to quash this Order of Sessions: For, the Jurisdiction was vested in the Sessions: who were *not obliged to give any Reasons* why They quashed it. It was left to them, to exercise their *Discretion*, upon the Appeal: They have done so, and have quashed the Rate; and They can not be compelled to specify the *Reasons* upon which They have quashed it.

Sir

Sir Fletcher Norton still urged, that if the Original Rate should appear to this Court to be a good One, they ought to confirm it.

But He was answered by the Court, That the Sessions, to whom the Power of judging upon it was delegated, have quashed it; and there appears no Ground to suppose that They have determined wrong. Therefore

Take Nothing by the MOTION.

Janssen, Bart. Chamberlain of London, *versus* Friday 25th June 1767.
Green.

THIS was an Action for a Forfeiture on 6 Ann. c. 16. § 5. for having acted as a *Broker*, without being admitted so to do by the Court of Mayor and Aldermen.

That Statute enacts "that every such Person so offending shall forfeit and pay to the Use of the said Mayor and Commonalty and Citizens, for every such Offence, the Sum of 25*l.* to be recovered by Action of Debt, in the Name of the Chamberlain of the said City."

The Declaration charges divers Instances of his acting as a Broker: To which He pleaded the General Issue.

The Point reserved at the Trial was, "Whether a Person, who for Brokerage and Hire negotiates and concludes Bargains for Stocks, is a Broker within 6 Ann. c. 16."

Mr. Eyre, Recorder of London, for the Plaintiff—

The Act of 8 & 9 W. 3. c. 32. "for restraining the Number and ill Practice of Brokers and Stock-Jobbers," recites the Inconveniences of the Number of such Brokers and Stock-Jobbers encreasing very much: and, to prevent such Inconvenience and their ill Practices, it enacts that no Person whatsoever shall act as a Broker, directly or indirectly, within the Bills of Mortality, till he be first admitted, licensed, approved and allowed of by the Lord Mayor and Court of Aldermen of the City of London, upon such Certificate of their Ability Honesty and good Fame, as hath been usual; under a Penalty of 500*l.* That Act contains several other Regulations: But it was only temporary, for three Years. After its Expiration, the Sixth of Ann was made: Which gives them the Power and Profit of admitting Brokers. These therefore

therefore are the same Sort of Brokers as are the Subject of the former Act.

Mr. Wallace, *contra*, for the Defendant, argued, that the Defendant has not acted as a Broker, *within the Sixth of Ann.*

The 1 Jac. 1. c. 21. describes a Broker, and defines a Broker to be a Person acting between Merchants or Tradesmen, in making and concluding Bargains concerning their Wares and Merchandizes, and Monies to be taken up by Exchange. But this Man's Act of negotiating Contracts for Stocks between One and Another, for Brokerage and Hire, is not within that Description.

By the last Clause of 8 & 9 W. 3. c. 32. Brokers of Stock, though admitted according to that Act, were prohibited (for a limited Time) from dealing; unless they should have a Licence from the Treasury. And it extends to Stocks then existing: The Words are—"Securities upon any Fund or "Funds granted by Parliament." Whereas this Stock is subsequent both to 8 & 9 W. 3. and 6 Ann.

*V. 7 G. 2: Lord MANSFIELD—Is not Sir John Barnard's Act *
• 8. §. 9. to prevent Stock-Jobbing, decisive of this Question? It directs, that "every Broker, or other Person who shall negotiate or act as a Broker, receiving Brokerage in the buying selling or otherwise disposing of any of the said public or joint Stocks or other public Securities, shall keep a Book, which shall be called *The Broker's Book.*" Can any Words more strongly express what the Parliament meant by a Broker?

Mr. Justice YATES—The Court will follow the parliamentary Idea of a Broker: And Sir John Barnard's Act ("to prevent the infamous Practice of Stock-Jobbing," is conclusive as to their Idea of a Broker. It also appears, from the Statute of 10 Ann. c. 19. sect. 121.

The Two Other JUDGES concurred.

Lord MANSFIELD—The Case of a Merchant who acts by Commission from a Correspondent abroad, may be a different Case: But here is Nothing in the Case before Us, to distinguish this Commission from common Brokerage.

Per CUR. unanimously—

POSTEA to be delivered to the PLAINTIFF.

Bosewell

Bosewell *versus* Irish.

Saturday

27th

June 1767.

MR. Cox moved, on Behalf of the Defendant, That the Plaintiff, being gone to reside abroad, and having left no Effects in *England*, might give Security for the Costs, in Case of a Verdict or Judgment for the Defendant. But

THE COURT were clear that it was altogether contrary to Rule *; and had been denied over and over.

* V. ante,

Mr. Justice ASTON said that He had taken so many P. 1026. Notes of the Refusal of such Motions, that He had ceased to take any more, as Being a Point fully settled.

Mr. Justice YATES also mentioned a very strong Case, where it was refuted, though it appeared that Peter Mingotti, the Plaintiff, lived totally in *Italy*, and never meant to come to *England*. He said, it was clogging the Course of Justice.

Per Cur'. unanimously—

MOTION DENIED.

Rex *versus* Edwards, and Symonds, Clerk.

MR. Morton and Mr. Thurlow, on Behalf of the Defendants who were charged with a Contempt, moved that They might come in personally and acknowledge the Contempt; without answering the Interrogatories which were exhibited against Them.

The Contempt charged upon Them was their not obeying a *Mandamus* to sign a Poor-Rate; and their keeping out of the Way, to prevent being obliged to do so: Which Offence They were ready to acknowledge, and submit to be punished for, in such Manner as the Court should think proper.

They cited 1 *Strange* 444. *Rex versus Barber*; where the Defendant objected to answer an improper Question put to Him: And the Court ordered the Interrogatory to be suppressed. They cited, as in Point, a Case of *Rex versus Burridge*, 9 G. 1. in this Court; where They said the Defendant, before answering Interrogatories, came in and confessed the Charge; and the Court imposed a Fine upon Him.

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N

And

And They said it was reasonable and proper to admit a Person charged with a Contempt, to come in and confess it immediately. Improper Interrogatories may be offered ; which the Counsel have no Opportunity to see ; and the Defendants may therefore be drawn in, to charge Themselves criminally. What can they do more, than confess the Charge ?

Sir Fletcher Norton, for the Prosecutor, said They were charged with much more than had been represented : They are charged not only with the Act, but also with doing it *out of corrupt Motives*.

THE COURT were clear, this Motion ought not to be granted. The Attachment is to bring them into Court, to answer to Interrogatories *to be exhibited*. There is Nothing to plead guilty to, till the Interrogatories are *filed* : Neither are They in Contempt till *reported so*. There is Nothing appearing to the Court at present, whereupon to *ground a Judgment or Fine or any Punishment*.

As to the Case of *Rex versus Burridge*—Such a Case must have been by Consent* : Or else, it can not be Law.

Cafe of Rex

* I find a w. Burridge, amongst my Notes of Trinity Term 1724, 10 G. 1. B. R. when an Attachment was granted against him. And the same Case is reported in 2 Ld. Raym. 1364. and in 8 Mod. 245. But I can find Nothing about this Confession before answering Interrogatories,

Per CUR'.

MOTION DENIED.

Rex versus Tarrant.

ON shewing Cause why an Information should not be granted against an Overseer of the Parish of *Hewish*, for procuring one *Richard Few*, a poor Man of the Parish of *Wilcot*, to marry *Elizabeth Swanton* a single Woman with Child of a Bastard ; in Order to get the Bastard settled—

The RULE was made ABSOLUTE for an Information.

Humphry

Humphry *versus* Leite..

Wednesday
1st July
1767.

MR. Hotchkins had moved to stay Proceedings against One of the Bail, who had been excepted to, and consequently had not justified; but had omitted to get his Name struck out of the Bail-Piece. He came very late with this Application; viz. after two *Scire facias*, and *Nicbils* returned to them. However, the Court gave Him a Rule to shew Cause.

Mr. Lucas now shewed Cause, on Behalf of the Plaintiff.

Mr. Justice ASTON remembered and cited a Case of * *Clement versus Tubb* and *Leper versus Tubb*, in 26 G. 2. * I have a full Note of on Mr. Ford's Motion, on Behalf of *Dighton*, who had been excepted to, but his Name remained upon the Bail-Piece. Mr. Ford cited a Case of † *Wilkinson versus Lomax*, Name of " That if Bail is objected to, and so does not justify, but *Tubb v.* " his Name is not struck out of the Bail-Piece, He shall not *Tubb*. It " be considered as remaining liable: And it is Time enough was Bail in " for Him to apply, when He first finds Himself attacked." Error. *Dighton* Therefore an *Exoneretur* was entered against *Dighton*: though *H*e did not object till He was attacked.

his Stead, *Leper* became insufficient. Whereupon, the Defendant in Error, on Affirmance of his Judgment, proceeded against *Dighton*. Upon which Mr. Ford moved to strike *Dighton*'s Name out of the Recognizance.

† N. B. The Case cited by Mr. Ford was, according to my Note, *Jenkinson v. Lomax*.

Mr. Justice YATES said, there was an old Case, " that a Bail who was excepted to, and had not justified, " must apply in proper Time, to have his Name struck out of " the Bail-Piece."

But in P. 4 G. 3. in a Case of *Fulk versus Birk*, upon Mr. *Ashurst*'s Motion, to stay Proceedings against the first Bail, who had not been struck out of the Bail-Piece, though He was excepted to, and had not justified; it was thought, that whilst his Name remained on the Record, the Proceedings could not regularly be stayed: And therefore the Court advised Mr. *Ashurst* to change his Motion, and move " to enter an *Exoneretur nunc pro tunc*." Whereupon, He accordingly moved it so: And I suppose it was so done; Though I know Nothing further of it, than what I have mentioned.

Per Cur.

On Payment of Costs, let an *Exoneretur* be entered,
nunc pro tunc.

Thursd. 2d
July 1767.

Goodwin *versus* Gibbons, One &c.

AFTER Two Verdicts for the Plaintiff, the Defendant had moved for another new Trial. It was an Action of Trespass: And the Trials had been in *Chester*.

The Defendant was an Attorney. At the first Trial the Jury found that He had acted beyond his Office and Authority or his Duty as an Attorney; and gave a Verdict for the Plaintiff: Which Verdict was set aside, and a New Trial granted. The second Verdict was also found for the Plaintiff: which second Verdict was now prayed to be set aside also; and a third New Trial was prayed. A Rule was made upon the Plaintiff, to shew Cause.

Upon shewing Cause, Mr. *Morton's* Report was read; and the Question was much litigated: But it is not necessary to specify the Particulars; because only the general Doctrine laid down is meant to be here taken Notice of.

* Lord MANSFIELD —— There is no Ground to say that a New Trial shall not be granted after a former New Trial has been once ganted before.

* I suppose There is an Index to a Report Book *, which mistakes a his Lordship decisive particular Reason in a particular Case, for a GENERAL Rule. See Modern Cases, Index, under the Word Modern; “Trial.”
Index says
—“After a Trial at Bar, a new Trial denied.” *Sed qu.*

But there is no such general Rule as has been supposed. A New Trial must depend upon answering the Ends of Justice.

However, in the present Case, He said, He did not see any Reason for a new Trial. He observed that here is no Question of Right, nor any great Value: And upon the Whole, he was clear that no New Trial ought to be granted.

Mr. Justice YATES was clear, that a second New Trial might be granted, as weil as a first, if the Reasons for granting it were sufficient.

But He also thought that in the present Case there was no sufficient Reason for granting one.

Mr.

Mr. Justice ASTON—The Case of *Gwinne versus Poole et al.* in 2 *Lutw.* 935. which cites *Olliet* and *Bessey's* Case in Sir T. *Jones* 214. does not contradict the Position—
“ That an Attorney may exceed his Authority and Jurisdiction ; and if he acts so with his Knowledge, may be guilty “ as a Trespasser.” And the Case of *Moravia versus Sloper et al.* in C. B. *Comyns* 574. recognizes the Doctrine “ that “ in justifying under the Process of an inferior Court, it “ is necessary to shew it to be within the Jurisdiction.”

Upon the whole Circumstances of this Case, he concurred, that no new Trial ought to be granted.

Mr. Justice HEWITT—If an Attorney knows that the Case is out of the Jurisdiction of the Inferior Court, I think He will be answerable : Especially, if He knows it clearly. Here, He did know it. And besides this, the Jury have found that He even *went beyond and out of* his Duty as an Attorney.

The Granting a new Trial a second Time must depend upon the Circumstances of the Case: 'Tis very difficult to lay down any certain Rule. Indeed, if Two or Three Juries have determined upon the same Point and the same Circumstances, it may be a Matter of Discretion, not to grant a New Trial, but to leave the Matter at Rest.

Upon the Circumstances of the present Case, no New Trial ought to be granted.

Per Cur. unanimously—

The RULE to shew Cause why there should not be a New Trial, was DISCHARGED.

Mayor of Norwich *versus* Berry, Gent.

Friday 3d
July 1767.

THIS was an Action for a Penalty of 40s. for the Breach of a By-Law.

The Declaration stated the Constitution of the Corporation ; which was incorporated by a Charter of King Henry the fourth, with a Power to make By-Laws. The Charter impowers them to choose a fit and proper Person to be Sheriff &c. The Corporation made a By-Law, which is particularly set forth in the Declaration, and whereof the Validity was not contested, imposing a Penalty of 40s. upon every Member

Member of the Corporation duly elected Sheriff, who should refuse to take the Office upon Him. The Declaration then shews a due Election of the Defendant to be Sheriff ; a due Notice to Him, of such his Election ; and an absolute Refusal by Him, to serve and execute the said Office. It likewise states an Oath which he was obliged to take, " to serve " the Office, and to submit to the Penalties &c.

The Defendant pleads, That he is, and was at the Time of his Election to the Shrievalty, and has continued for twenty Years last past, an ATTORNEY of the Court of Common Pleas at Westminster ; and that he has, during all that Time practised, and still does continue to PRACTISE as Such ; and that by the ancient Custom of that Court, Time out of Mind used and established, no Attorney of the said Court shall, during the Time of his acting as Such, be drawn or compelled &c &c : And so pleads his Privilege in due Form. He then shews that the Oath of Office of Sheriff requires his Residence at Norwich, during his Shrievalty : which is incompatible with his necessary Attendance at Westminster, in the Court of Common Pleas. He shews proper Notice given by him, of this his Excuse and the Cause of his Refusal to take upon Himself and serve the Office ; and he concludes with justifying such Refusal.

The Replication avers that he was resident at Norwich, at the Time when he was first admitted an Attorney of the Court of Common Pleas ; and had been so for many Years before that Time : And that being an Inhabitant and House-keeper in Norwich, he was admitted an Attorney of the Common Pleas.

The Defendant demurred to this Replication : And the Plaintiff joined in Demurrer.

The QUESTION was " Whether a Corporator resident in the Corporation, and afterwards becoming and being admitted an Attorney of one of the Superior Courts in Westminster-Hall ; and after such Admission, duly elected Sheriff of such Corporation ; is privileged from serving the said Office."

Mr. Ahurst, on Behalf of the Defendant, argued in the first Place, that His being resident at Norwich is out of the Case ; because it appears upon the Pleadings " That He has been a PRACTISING Attorney of the Court of Common Pleas for the last twenty Years :" And therefore the Place of his Residence is totally immaterial.

If an Attorney lays his *Venue* in *Middlesex*, it shall not be changed on Application by the Defendant, on Account of his Residence in the Country: Provided He continues a Practiser. *Pope et Ux^r. versus Redfearne, Un^r. &c. H. 7. G. 3**.

*V. ante,
p. 2027. (on
the last Day
of Hilary
Term last.)

He is understood and supposed to be attendant upon the Court; whether He in Fact is so, or not.

Having laid this Point aside, as being out of the Case—

The General Question is, “ Whether an Attorney has this Privilege, or not.”

This is the Privilege of the *Court*; not of the Attorney Himself.

The Form of the Writ of Privilege shews this: The Form of the Writ plainly considers it as such. And numerous are the Cases where Privilege has been allowed: *Prouse's Case* in *Cro. Car. 389.* An Attorney was elected *Constable*; but discharged from executing the Office: So also in *Noy. 112. Corner's Case.* In *George Venable's Case*, *Cro. Car. 11.* He had been pressed for a Soldier; and the Writ of Privilege was granted. In the Case of *Jonathan Evingdon*, an Attorney, 2 *Str. 1143*—He was summoned on the *London Militia*, and exempted: So in *Heaton's Case*, 2 *Barnes's Notes*, p. 33 †. + p. 42. in *M. 14 G. 2.* He had his Writ of Privilege to excuse Him _{4to Edit.} from serving in the Trained Bands of the City of *London*. And there is a Precedent of the like Kind in the *Officina Brevium* 164. and another in p. 174. In *Stone's Case*, 1 *Ventr. 16, 29.* who was a Copyholder of a Manor, and the Homage had chosen Him Collector of the Lord's Rent for the Year following; His Privilege was allowed. So, in the Case of Bailiff of a Borough, (*Officina Brevium*, 166;) or a Mayor of a Borough, (*Officina Brevium*, 174) a Writ shall issue. *Evingdon's Case*, abovementioned, cites the two Precedents of *Officina Brevium* 164 and 174; and recognizes them.

¹ *Barnes's Notes* 29 †. *Seymour Richmond's Case*—He had been elected Bailiff of *Abingdon* in *Perks*: The Court refused ^{† P. 37. in} _{4to Edit.} to set aside the Writ of Privilege which He had obtained; and said, the Corporation must act at their Peril.

It appears by *Evingdon's Case* in *Sir J. S. 1143.* and by ¹ *Lev. 265. Stone's Case*, that the Power of serving by *Deputy* makes no Difference.

However,

However, this Office can not be served by Deputy.

Here, the Sheriffs swear " that They or One of them shall
" be resident at Norwich during the Time of their being She-
" riffs." And the Nature of the Office of Sheriff requires
personal Attendance.

If it be objected, " that He was a Corporator at the Time
" when He was admitted an Attorney"—This is no Crime in
itself; nor is One, with Respect to the Corporation. Upon
his Admittance to be an Attorney of C. B. the superior Pri-
vilege of that Court attached: And the Court of Common
Pleas has a Right to require his Attendance there, upon his
public Duty, in Preference to that of a Member of a private
Corporation.

Mr. Wallace, contra, for the Corporation of Norwich.

By the Charter of H. 4. the Corporation are to have She-
riffs.

The Privilege of an Attorney shall not protect a Corpora-
tor from accepting and executing the Office of Sheriff;
which He is under a prior Obligation to accept; and was so,
long before his Admission to be an Attorney of C. B.

In 1 Ld. Raym. 29. *Rex & Regina versus Larwood*—it is
laid down by Lord Chief Justice Holt and Sir Gyles Eyre,
" that no Man can be exempt from the Office of Sheriff, but
" by Act of Parliament or Letters Patent." In Proof where-
of, are cited—*Savil* 43. *Herbert Pelham's Case*: and 9 Co.
46 b. *The Earl of Salop's Case*.

Dr. Lee's Case, who was chosen Expenditor of Romney
Marsh; and the Case of a High-Constable who was exempted
from being Collector for the Poor, during his Office of High-
Constable, in Sir Thomas Jones 46. and Alderman Abdy's
Case, in *Cro. Car.* 585. and Sir William Jones 462. who be-
ing an Alderman of London, was discharged from serving the
Office of Constable for his Parish in Essex; may all seem to
be, in some Degree, Authorities against me.

But these were superior Offices. So also was Evingdon's Case,
in 2 Str. 1143.

*N.B. The two Precedents in *Officina Brevium* 166, 174*. The two Precedents cited from thence are no Authorities. They are no settled Determinations: The Writs issued of Course.

There is no Writ of Privilege for Attorneys, in the Register, as to serving Offices : They are only, as to Suits.

The Office of a Sheriff is *superior* to that of an Attorney.

By entering into the Corporation, He obliges Himself to bear all the Offices of it, to which He may be in future elected : And here He is also bound to it by his *Oath* as a Corporator.

Though an Attorney's Privilege is the Privilege of the Court to which He belongs ; yet the Attorney may *wave* it. So, where He is *Co-Defendant* or *Co-Obligor*, He loses his Privilege.

He is therefore bound to bear this Office, in common with the other Citizens of *Norwich*.

Mr. *Ashurst*, in Reply—This Question is between the Corporation and the Attorney, about a mere Corporate-Office : It is not a Question of Prerogative of the *Crown*.

The Superiority or Inferiority of the Office is not the Question : The Question is—“ Whether the Court of Common Pleas are to lose the public Service of the Attorney, “ or not.”

His Obligation and Oath to the Corporation must be confined to *such* Offices to which He is *properly eligible*. His In-capacity to execute it arises upon his being admitted as an Attorney of the Common Pleas ; which was no Crime in Him : And if it was no Crime, He can not be *thereby* liable to a Forfeiture.

An Attorney can not be properly said to wave his Privilege. If it does not judicially appear, the Court can not indeed take Notice of it : But if it does judicially appear, the Court may interpose.

If an Attorney is joined with *Others* as a Defendant, They can not All have Privilege : And therefore He loses his ; because All must have it, or *None*.

Lord MANSFIELD, after stating the Case minutely, said, The Question is very properly put, upon this Record.

I own, that on a former Motion relating to this Contest, I thought it hard that an Attorney should become a Member of a Corporation, and *enjoy all the Benefits* and Advantages accruing from his being a Member of such Society ; and yet *avoid the Burthens* and troublesome Offices which the other Members

Members of the same Society or Corporation were obliged to submit to and undergo: I own, this appeared to Me to be unreasonable, when the Matter was first brought before the Court, upon an Application for an Information against this same Defendant, for refusing to take the Office upon Him: I had a strong Prejudice against this Claim of Exemption from it, upon the Reason of the Thing on the *first View* of the Question.

But upon looking into the Cases, and hearing the Argument of the present Case, I think it is too late to recur to Principles, in the Light wherein I had considered the Matter. For, the Privileges insisted upon, as the Ground of Exemption, is the Privilege of the *Court*: And the Cases cited in Support of it are very strong; particularly, the Case of *Evingdon*, which relates to his Exemption from being on the Militia, a Service concerning the general public Safety of the Kingdom.

I lay great Stress upon the two Precedents of near a Century and ^{*}a Half ago, and *no* Instance in Contradiction to them.

^{*}Officina

Brevium
164 & 174.

The Case of a Sheriff of a County at large may possibly be a different Case. But I know that *Barristers* are considered as exempt from serving *that* Office: and an Attorney might perhaps have the same Reason to object to it; though, indeed, that is not a Case so likely to happen.

Prouse's Case (in *Cro. Car.*) is very strong: For, there the Obligation to serve the Office arose from the Tenure of his Houses; and He had bought seven Houses in the Vill where He was elected Tithing-Man.

The Oath "to serve the Office and to submit to Penalties," is only to be understood of such as He is *not excused* from serving. And the Oath of Residence in *Norwich* is incompatible with his Attendance at *Westminster*, in the Court of Common Pleas.

Therefore it is now a settled Point. The Attorney ought to have his Privilege allowed.

Mr. Justice YATES—*If* he had *left off* his Business, his mere remaining on the *Roll* would be no Exemption to Him.

But it appears upon this Record, "that He is, and has "for twenty Years continued, an *acting* Attorney of the "Court of Common Pleas."

This

This is not a Contest merely between the City of *Norwich* and *this Man*: It is a Contest between the City of *Norwich* and the *Court of Common Pleas*. It is the Privilege of the *COURT* that is here in Question. It has existed *as long as* the Court: And the Crown *could not*, by a Charter granted to a Corporation, take it away.

The Court must have *Ministers*: The *Attornies* are its *Ministers*.

The *inferior* Duty to the Corporation must give Way, where it interferes with the superior Duty to the Court and to the Public.

The Cases of *Stone* and *Prouse* are very strong. The General Usage of the Kingdom, or the particular Custom of a Town, shall not take away this Privilege.

By the Charter, the Corporation are to choose a *fit and proper Person*. This Man is *not so*.

The Oath of the Corporator must be confined to *due Elections*, and to Persons not having a *lawful Excuse*. This Man has a *lawful Excuse*. An Attorney shall be exempt from all Offices *incompatible* with his Attendance in his Court. The Interest of the *Kingdom* is concerned in this. The King can not, by a *local Charter*, take away this Privilege. An Attorney has this Privilege, because He is *bound to attend the Court* of which He is a Minister: He is intitled to *this Privilege*, as much as He is to that of not being called out of his Court by a *Suit* brought against Him in another Court. And as He is obliged to this Attendance on the *Court of Common Pleas*; therefore He is not within the *By-Law*, which makes his Attendance requisite in another Place: For, He can not be necessarily attendant in both Places at the same Time.

Mr. Justice ASTON—*If* He had left off Practice, it had been quite another Case. In the Case of *Bury* versus *Maynard Clarke*, Esq. who had been an Attorney, and had left off Business, and would have set up his Privilege; there was produced a Rule of 1654, “That an Attorney not acting for a Year, (unless hindered by Sickness,) shall lose his Privilege.” The Name continuing on the Roll signifies nothing.

But whilst He does *continue to practise*, the Privilege “of not being drawn from attending his Court” is as old as the Court

Court on which he is attendant. The *Officina Brevia* shews it as far back as the Time of King James the First.

The Privilege is instituted for the Sake of the Suitor, " that the Attorney in his Cause shall not be drawn away from his Court, which it is his Duty to attend." Therefore a *superior* or an *inferior* Office makes no Difference, in my Opinion.

Mr. Justice HEWITT—The Privilege of the City of *Norwich* is much more recent than this Privilege claimed as an Attorney. The former is only since the Time of H. 4: But the Privilege of the Court of *C. B.* is *immemorial*. An Attorney is not to be drawn away from his Attendance on his Court, to attend ANY other Offices whatsoever. So says the Writ itself: And the Cases which have been cited, shew it. *Stone's Case* and *Prouje's Case* are strong.

The Cases do not enter into any Priority, or inquire when the Person became privileged: They all look at the Circumstances of the Party at the Time of his being required to execute the Office put upon Him.

Therefore, upon all the Cases considered, I think this Attorney is intitled to his Privilege.

Per Cur'. unanimously—

JUDGMENT for the DEFENDANT.

Friday 2d
July 1767.

Rex versus Sutton.

SIR Fletcher Norton moved to quash an Indictment for a Nuisance in keeping a House (near Epsom) for inoculating for the Small-Pox. The Case of *Rex versus Wilmer and Nichols*, in Easter Term 6 G. 3. in this Court, was cited; and another Case or two were hinted at, where Rules had been made to shew Cause.

But *per Cur'*.—You must demur: We do not of Course quash Indictments for Nuisances, upon Motion. We have thought of this: We are not bound to quash this Indictment on Motion. You must demur.

MOTION DENIED.

Belither

Belither *versus* Gibbs.Saturd 4th
July 1767.

THE Defendant had moved to be discharged on *Common Bail*; and had obtained a Rule to shew Cause why he should not be so.

The Question was, "Whether the Plaintiff in an Action of Debt upon a Judgment for upwards of 10*l.*; can hold the Defendant to *Special Bail*, in this Court, where the Original Cause of Action was under 10*l.* but the Judgment, by the Addition of Costs, exceeded 10*l.*"

Sir Fletcher Norton, on Behalf of the Plaintiff, shewed Cause, upon the last Day of last Term, why the Defendant should not be discharged on *Common Bail*.

He observed that the two Courts of King's-Bench and Common Pleas differ in their Practice. C. B. hold to *Special Bail*, in such Cases: B. R. accept *Common Bail*. And he argued in Favour of the Practice of the Court of Common Pleas.

Costs are Damages. It is one entire Judgment: And it must be one entire Execution.

Mr. Davenport, *contra*, relied on the Practice of this Court; argued that it was right and reasonable; and cited the Cases of *Gammage versus Watkins*, P. 7 G. 2. B. R. 2 Str. 975. and *Robinson, Un'.* &c. *versus Nicolls*, Tr. 10 & 11 G. 2. B. R. 2 Str. 1077 strong in Point. In the former of those two Cases, the Debt was three Guineas: But the Costs swelled it to 14*l.* 10*s.* Here the Original Debt was only 3*l.* 9*s.* 6*d.*; but by the Addition of Costs, it is swelled up to 14*l.* But, as the Original Demand did not require Bail, the Addition of Costs will not alter the Case.

Lord MANSFIELD—'Tis Pity that the two Courts should differ in their Practice upon an Act of Parliament *. *V. 12 C. 1. There is Reason, I think, to lean against requiring Bail on c. 29. § 1. the Action of Debt on Judgment, when it could not be required in the Original Action.

In Error, brought upon an Action of Debt on Judgment, the Action of Debt on the Judgment follows the Nature of the Original Action: And yet Bail shall not be required on bringing a Writ of Error upon the Judgment obtained in the Action

Action of Debt on the first Judgment. This was so settled in the Case of *Bidlefon Esq. Administrator &c. versus Whytel Esq. Tr. 4 G. 3.* in this Court. [V. ante, Vol. 3. p. 1545.]

Mr. Justice ASTON—The Practice of this Court is more in Favour of Liberty, than that of the Common Pleas.

Lord MANSFIELD said, There should be a Uniformity between the two Courts. And he recommended it to Mr. Justice ASTON, to take a Note of this Matter, and talk with the Judges of C. B. about it. He observed, that the Subject will get Nothing by this Court's *not* holding to Bail; because the Plaintiff will bring his Action in the Court where He *can* hold the Defendant to Bail: So that the Defendant will not be at all relieved from finding Special Bail, when the Suit may as well be brought in the Court which does require it, as in that which does not.

CUR'.—It is settled in this Court, “ That Common “ Bail should be accepted: And We must keep to our own Rule.

The RULE was therefore made ABSOLUTE, “ That “ the Defendant be discharged upon Common Bail.”

Note—THE COURT took the proper Methods of obtaining a Uniformity of Practice in the two Courts, for the future. And, in Consequence thereof,

Lord MANSFIELD now declared the Result of a Conference they had had with all the Judges: Which he shortly expressed, in the Words, or to the Effect following—

I have laid this Matter before all the Judges. They All think *our* Practice to be the more reasonable, and more agreeable to the Act of Parliament: And I believe the Court of Common Pleas will alter their Practice.

Monday 6th July 1767. Rex *versus* Eyres and Bond, Manucaptors of Houncel.

THIS Recognizance had been forfeited; a *Sire facias* brought upon it; and a *Leveri facias* issued; and the Sheriff returned 20*l.* *levied* of the Goods and Chattels of Bond; and that Eyres had not any Goods &c, wherof &c.

On

On *Tuesday 12th of May* last, Mr. *Stow* moved that I might tax the Prosecutor's Costs; and that they might be paid to the Prosecutor *out of this Sum levied*.

THE COURT gave Him a Rule to shew Cause: But the next Day, on being fully apprized how the Matter stood, and that it was the *King's Money*, They thought They could not make such a Rule; and Ordered that it should *not* be drawn up.

Mr. *Lucas* now renewed Mr. *Stow's* former Motion. He said the Court of Exchequer had been applied to: And that They thought the Matter was not sufficiently before *Them*, for *Them* to make any Order therein; it being, at present, before *this Court*.

Lord MANSFIELD—Let the Master tax the Costs: And let Notice be given to the Defendant and the Bail, to shew Cause why the Costs so taxed should not be paid to the Prosecutor; and the Surplus of the Money levied be returned to the Defendant or the Bail upon whom it was levied.

This is the best and easiest Method. The King has no Interest in this Money: He is only Royal Trustee for the Party.

Castelman's Cafe, ads'. Price, Clerk.

Tuesday 7th
July 1767.

(*V. post. pa.* .)

THIS was a Question on the Insolvent Debtor's Act, 5 G. 3. c. 41. wherein it was provided "that all those who did not obtain their respective Discharges before the 1st August in the Year 1767, should be excluded the Benefit of the Act." [*V. p. 725. sect. 40.*]

This Man had been brought up to the Quarter Sessions of *Surry*; and They had declared Him to be *irrelievable*; because He was charged with an Outlawry: Therefore They remanded him.

Note—The Persons intitled to receive the Benefit of the Act, were thus described in it—"All and Every Person who on the 1st of January 1765, was or were, or at any Time since have been, and at the Time of making out every such List shall be, really, an actual Prisoner or Prisoners in the Custody of any Gaoler or Gaolers or Keeper of any Prison respectively, upon any Process WHATSOEVER,

" for

"*for or by Reason of any DEBT, DAMAGE, Costs, Sum or Sums of Money, Contempt, OR OTHERWISE.*"

Mr. Cox, on Behalf of the Defendant, said it was a very hard Case; and a Case of great Compassion.

The DIFFICULTY was how to come at Relief.

The COURT thought, The best Way would be by removing the Order hither: And, there being no Clause in the Act to prohibit a *Certiorari*, They granted One.

Silward's Case was mentioned, where a Verdict had been obtained against Him, in an Action for a malicious Prosecution, and 500*l.* Damages; and the Defendant was committed thereon, and remained in Prison upon a special *Capias utlagatum*, for that Cause only.

V. post, towards the End of this Term.

Wednesday
8th July
1767.

Rex *versus* Dawes :

Rex *versus* Marten.

* V. ante,
p. 1962. and
p. 2022.

(* *Winchelsea Causes.*)

THESE Causes stood adjourned from *Tuesday* the 10th of *February* last.

The COURT having maturely considered them—

Lord MANSFIELD now delivered their Resolution; after recapitulating the Substance of what had already past.

It having been suggested, from the Bar, upon the Occasion of different Motions impeaching the Titles of Corporators in the Borough of *Winchelsea*, after a long quiet Enjoyment; "that it would be absolutely necessary to draw a Line, and to fix the precise Period of Possession, which ought not to be disturbed by any Information in the Nature of a Quo Warranto granted under the discretionary Power given by 9 Ann. c. 20;" the Court declared, in the Beginning of last Michaelmas Term*, "that, from the Reason and Analogy of several Statutes upon several Matters, a quiet and undisturbed Possession of a Franchise for 20 Years, ought to be a Bar to any Application made to this Court; though it could be no Bar to the King

"King Himself, if He should think fit to prosecute the Usurpation by his Attorney-General."

The Court, at the same Time declared, "that, within 20 Years, Length of Time might weigh as presumptive Evidence; or as one Circumstance joined to Others, to shew the Impropriety of granting an Information."

Agreeable to this Distinction, in the same Term, the Rule against *Edwin Wardroper* was discharged*. The Objection* V. ante, of Non-Residence at the Time of his Election being denied, P. 1965. the Length of Time, though within 20 Years, supported the Denial, and set the Informers in so unfavourable a Light, that the Rule was discharged with Costs.

In Hilary Term, the Rule against *Richard Wardroper* (Length of Time, though within 20 Years, supporting and corroborating his Defence,) was discharged †. † P. 2025:

In the same Term, the Rule now under Consideration against *Dawes* was discharged ‡. The Counsel for *Dawes* did not ‡ P. 2024. read his Affidavit: The Counsel for the Rule talked of it, and observed upon it, but did not choose to read it.

A Doubt arose in my Mind, "Whether the Rule was rightly discharged;" because, if *Dawes* did not deny the Incapacity objected to Him, which was a Fact within his own Knowledge, it ought to be taken to be true.

I doubted "whether, the Defect of Title being admitted, an Information ought to be refused, if applied for within 20 Years." But, if it ought to be refused; as Certainty is one great Object of all legal Determinations, and peculiarly to be wished for in that Branch of the Law which concerns Corporations (because such Questions are often agitated with a Heat and Spirit not to be satisfied by the best Reasons of the soundest Discretion, and only to be checked by the Authority of Rules and Precedents deliberately settled upon former Occasions;) I wished the Matter might be further considered; and that the Reasons of the Judgment, whatever it might finally be, should be fully understood. I mentioned my Doubt the next Morning. Then, the Affidavit of *Dawes* was read; which does, in Effect, admit the Objection at the precise Time of his Election.

We took Time to think of it.

In the same Term, came on the Rule against *Thomas Marten*, now under Consideration. And Both were enlarged, with PART IV. VOL. IV. O Liberty

Liberty to file Affidavits, as to the Consequences to the Corporation, from granting Informations against Either or Both
 V.p.2023, of Them.
 2024.

The Affidavits made pursuant to this Order, were read last Easter Term: But, a Bill having been brought into the House of Commons, relative to the Subject Matter of these Motions, We suspended giving any Opinion. The House of Commons not having thought fit to entertain that Bill, We are now called upon to give our Judgment.

And first—As to the Rule against *Dawes*—

It is an Application, for Leave to exhibit an Information against him, to shew by what Authority He claims to be a Freeman of the Borough of *Winchelsea*; upon this Ground — That by the Constitution of the Borough, No Person can legally be elected a Freeman, who does not reside and pay Scott and Lott in the Town, at the Time of his Election: That *Dawes* was elected on the 22d of September 1747; and that He did not then, or at any Time before, reside or pay Scott and Lott in the Borough.”

It appears upon the Evidence, That before his Election to the Freedom, He was *Town Clerk* of the Borough, and constantly attended all the Corporate Business; That soon after his Election, He hired a House in the Town, and has dwelt there ever since, with his Wife and Family; That from that Time to this He has served all the *Parish Offices*, and paid all Kinds of *Taxes*; That Two of the Three Informers were present at his Election, and voted for it; That he has generally voted in the Corporate Assemblies at the same Time with all the Three Informers, and None of them ever made the least Objection to his Right, till within Nine Months before this Application; That He has been elected into and served the Office of a *Jurate* from the Year 1756; That He has twice been *Mayor*, and in 1762 was elected to that Office unanimously; That He has constantly exercised all the Rights of a Freeman, from the Time of his Election in 1747 till the present Application, without any Interruption whatsoever; That many derivative Rights would be affected by a Flaw in his Title; which might throw the Borough into great Confusion, and perhaps tend to a Dissolution of the Corporation.

UNDER these Circumstances, We are clearly and unanimously of Opinion, That it would be contrary to the Trust reposed in Us, by the Statute of Queen Anne (which had a View to speedy Prosecutions, and to quicken the Removal of Usurpers,) to give Leave to these Informers who now apply, to

to make Use of the King's Name and Suit, to call the Validity of this Franchise in Question.

Our Grounds are Three, taken together.

First—The Light in which the three *Relators*, now in Reasons forming the Court of this Defect of Title, appear; from 1. their Behaviour and Conduct relative to the Subject Matter of their Information, previous to their making this Motion.

Secondly—The Light in which the Application itself manifestly shews their *Motives*, and the Purpose which it is calculated to serve. 2.

Thirdly—The *Consequences* of granting the Information. 3.

As to the First—The Objection does not lie in *their Mouths*. They all knew the Constitution of the Borough, before *Darves* was elected; and They All knew He did not then reside: Yet Two of the Three *voted for him*; and All Three have voted *with him*, ever since the Year 1747; have *acquiesced* in his being a Jurate, ever since the Year 1756, and in his being twice Mayor; and have *assented* to many Persons deriving Rights under Him, *as if* He was duly qualified.

They come now to complain of their *own Iniquity*: They come to set aside Effects of which They Themselves have been the *Cause*. They come to desire They may represent the King, to prosecute Guilt of which They Themselves are *Partakers*. They have laid a Snare for the Corporation; drawn Them into Error; and, after having been Tempters, desire to put on the Character of *Accusers*. *Non tali Auxilio, nec Defensoribus iſſis*. The Cause of the King and Public, for the Usurpation of a Franchise, ought not to be trusted in *such Hands*.

Secondly—They shew no Right or Interest of their Own, or of any other Person, which depends upon invalidating the Title of *Darves*: Therefore They can only inform as *Amici Curiae*, or in general.

But the Objection is such, That so far as the *Borough* or the *Crown* is concerned, it has been substantially cured, ever since his Election. No new Constitution has been usurped on the Crown.

It is admitted, “that Residence is a *necessary Qualification*.” But the *End* for which it was made a *Qualification* has been fully answered in the present Case, by his subsequent Con-

duct: For, He has resided, and executed all the Offices, ever since his Election.

It would therefore be acting with the utmost Rigour of the *summum Jus*, if the *King Himself* was to pry with Eagle's Eyes into such a Defect; and, certainly, ought not to be indulged, by this Court, to *private Informers, ACCOMPLICES in the Usurpation.*

Thirdly—The *Consequences* of granting the Information may be fatal to the Borough; and an Example thereby set, that Men may lie in wait, and lay a Scheme, for many Years, to draw a Corporation into Acts, which They may afterwards, for occasional and corrupt Views, turn to their Destruction.

The Parliament have intrusted Us with the Authority to give a private Informer *Leave* to prosecute the *Usurpation* of a Franchise, in the *King's Name*.

We are All clearly and unanimously of Opinion, “that THESE Informers *ought not to have that Leave*;” and “that it never ought to be granted to *any* Informers, who “shall appear, under all the same Circumstances, in the same unfavourable Light.”

As to the Rule against *Thomas Marten*—The Application is for Leave to exhibit an Information against Him, that He may likewise shew by what Authority He claims to be a Freeman of *Winchelsea*.

The Objection is—That He did *not pay Scott and Lott*, at the Time of his Election.

The Case, upon the Evidence, appears to be this.—He was elected on the first of *October 1753*; He has, ever since, attended almost every Assembly of the Corporation; and He has, all along, *voted and acted as a Freeman, without the least Objection to his Title*. One of the Three Informers, now applying against Him, *consented* to his Election and *voted for Him*, with full Knowledge; and has voted with Him upon almost every Occasion since. And He has voted, upon ten several Occasions, with the other Two: Yet neither *They*, though they *then knew* the Objection now made, “that He was not rated,” (for *They* do not alledge it as a *new Discovery*,) nor *any other Member of the Corporation, ever questioned his Right*.

Besides a *Tenement* which He occupies, of 10*l.* a Year, He is seized of a *Freehold Messuage and Land* within the Borough: And by a Church-Rate made after the 1st of *Octo-*
ber

ber 1753, He was *affeſſed* from Easter 1753, and paid such Assessment; and ſince his Election, He has conſtantly been rated and paid.

The Informers ſhew no Right in Themſelves or any other Person, which depends upon invalidating the Title of *Marten*. No Question arifes upon the Constitution of the Borough. The only Defect charged upon Him is, “the not being rated *at the precise Time of his Election*:” Which He now is, and has been ever ſince.

Many of the Reasons upon the former Case (of *Dawes*) hold in this: Though this Case is weaker than *Dawes's*. However, We are of Opinion that the Circumstances which ſhew this to be weaker, ought not to be nicely weighed; because they are opposite Applications; (They who defend *Dawes*, attack *Marten*:) And though the one Case is stronger than the other, yet the ſame Reasons ought to have the ſame Weight in both Cafes; and they are enough alike to be connected in the ſame Judgment.

The Peace of the Borough is preserved, from Both, by the Exertion of that legal Discretion which is equally applicable for the Benefit of Both.

Therefore We are All of Opinion, That Both Rules ought to be discharged.

BOTH RULES DISCHARGED.

Rex *versus* Inhabitants of Tavistock.

This Case is already published in the Quarto-Edition of my SETTLEMENT-CASES, No. 186. p. 578.

Rex *versus* Osborne.

THIS Indictment had been removed into this Court, by a *Certiorari*; and the usual Recognizance was thereupon entered into*. The Defendant was convicted, and *V. 5 & 6 fined 50*l.* and the Prosecutor had got a third Part of it, by W. & M. an Order of two Judges, purſuant to the privy Seal.

c. 11. § 2, 3,
made perpe-
tual by 8 &
9 W. 3. c. 33

On

On Thursday the second of this Month, Mr. Morton moved for Directions to Me, to tax the Prosecutor's Costs under the Recognizance entered into upon the *Certiorari*; and had a Rule to shew Cause.

Sir Fletcher Norton shewed Cause. The Defendant has been fined 50*l*; and the Prosecutor has received one-third of the Fine. Therefore He can not have Costs under the Recognizance, over and above the one-third of the Fine.

*The Words. The Recognizance refers to the *Discretion* of the Court*: of the Act And the Court will not, in their *Discretion*, give Costs beyond are—"that the one-third of the Fine.
"if the Defendant be
"convicted, the Court of King's Bench shall give reasonable Costs to the Prosecutor,
"if &c."

Mr. Morton—The Costs I apply for, are the Costs arising from the Removal of the Indictment by the Defendant. We are intitled to these Costs over and above the one-third of the Fine.

He denied that the Costs under the Recognizance are *discretionary*: They are absolutely payable, by the express Words of the Statute—"the Court shall give."

But THE COURT were of Opinion that the Prosecutor could not have both these Advantages; namely, the Costs under the Recognizance, and also the one-third of the Fine. They therefore made a Rule "that I should tax the Costs upon the Recognizance, according to the Direction of the Act of Parliament; and that so much as the Prosecutor has received for the one-third of the Fine be deducted out of the Sum allowed."

Champion *versus* Gilbert.

ON Thursday the 25th of last Month, Sir Fletcher Norton moved that the Defendant might be discharged upon Common Bail; and had a Rule to shew Cause.

The Affirmation of the Plaintiff alledged "that the Defendant was indebted to Him in 5000*l*." But it did not stop there; (which Sir Fletcher owned would have concluded Him:) It went on further, and added Words, which rendered it *unpositive*.

The Words of it were—"That the Defendant is justly and truly indebted to Him in the Sum of 5000*l*. for so much

" much Money had and received of this Affirmant, and for
" which He has not accounted."

THE COURT held, that these last Words rendered it
not positive. And therefore the Defendant was

DISCHARGED on *Common Bail.*

Rex *versus* Castelman.

(*V. ante, p. 2119.*)

THE Order of Sessions being now removed hither by *Certiorari*, Mr. Cox, supported by Sir Fletcher Norton, moved to quash it : as not being within the Intention of the Act : It is a *negative Judgment* only. And They urged, that He had been five Years in Gaol ; and had no other Creditor : And if He was not relieved now, He would be a Prisoner for Life.

Mr. Baynham objected to the *Certiorari* ; it not being granted *within six Months* from the making the Order of Sessions ; (for, it is now eighteen Months since;) and *no Notice* has been given to the Justices who made it : Both which Circumstances are required by the express Direction of the Act of 13 G. 2. c. 18. § 5. in order to the due and regular issuing of a *Certiorari* on a Proceeding before Justices of the Peace.

Per CUR.—The Justices had no Authority to give this negative Judgment, " That He is irrelievable." 'Tis a Nullity : It is no Order at all. But there is no Difficulty, if the Justices at Sessions will act : He may be brought up again before them ; and They may make an Order of Discharge.

We can not meddle at present : because there is *no Notice* to the Justices ; and therefore no *Certiorari* was grantable. The best Way is, to apply to the Sessions.

Welford *versus* Davidson.

AN Action had been brought in this Court ; and Judgment obtained thereon. A Writ of Error was brought in the Exchequer-Chamber, upon this Judgment ; and Bail given on bringing the Writ of Error : And the Judgment of this Court was affirmed in the Exchequer-Chamber. After which Affirmance, a *Scire facias* was brought here against the

the Bail. The Bail pleaded Payment; and used all Methods of Delay: Whereby they staved off the Payment of the Money recovered, so long, that the Interest of it exceeded the Costs they were by the ordinary Taxation, to pay; and consequently they would be considerable Gainers by the Delay.

Mr. Wallace, on Behalf of the Defendant in Error, moved that the Master might allow the Interest of the Money recovered, in Damages*

Stat. 2. c. 2.

§ 8, 9, 10. and ante, p. 1096.

Lord MANSFIELD— You cannot go back further than the Judgment in the Exchequer-Chamber: For, the giving or not giving Interest, to that Time, was the Province of the Court of Exchequer †:

† See this

Subject very minutely discussed, in Bodily v. Bellamy, ante, p. 1097.

But the Master should allow Interest FROM the Time of affirming the Judgment by the Exchequer-Chamber.

The COURT made a RULE accordingly.

The End of Trinity Term 1767, 7 G. 3.

Michaelmas Term

8 Geo. 3. B. R. 1767.

Rex *versus* Thomas Elkins.

Monday 9th
Nov. 1767.

THIS Man had been returned, by the Sheriff of Wilts, " guilty of a RESCUE ;" (upon an Arrest on mesne Proces;) And an Attachment of Course had issued against Him, upon that Return. He was taken thereupon, and had been confined seven Weeks in the County-Gaol of Wilts ; and was afterwards bailed, to appear in this Court : Which He now did.

Upon Friday the first Day of this Term, Sir Fletcher Norton, on his Behalf, proposed that the Court should immediately proceed to punish him, without going through the ordinary Course of his being examined upon Interrogatories ; as no Denial by him, upon such Examination, could excuse him, after having been returned " guilty of a Rescue " by the Sheriff.

THE COURT were of this Opinion. They said, It would be giving an Opportunity to traverse the Return ; which, in Case of a Rescue returned, could not be allowed. And accordingly, They ordered him to be brought up again on this Day.

And being now brought up, Sir Fletcher Norton cited an anonymous Case in 2 *Salk.* 526. where Sir Samuel Astry said " It was the constant Course, upon the Return of a Rescue, to set 4 Nobles Fine upon each Offender ; and " that He " had it from Mr. Justice Twyden *."

* And see Sir T. Jones,
198. the

Case of Penfold, Mariner, and Five Others, P. 34 C. 2. B. R. exactly agreeable thereto. Yet in Mich. 1739. 13 G. 2. B. R. Rex v. Alway et Al'. the Court set a Fine of only 6s. 8d. each ; though Both these Cases were mentioned to them.

Lord

Lord MANSFIELD—That seems to be a strange Rule: It puts all Rescues, in all Cases and under all Circumstances, on the *same* Foot.

***Mr. Justice Hewitt** was in the present Case: But as the Man had already been seven abient. Weeks in Prison: They only

FINED Him 5*l.*

Tuesday
30th Nov.
1767.

MEMORANDUM. On a Question—" Whether the Defendant had till *Tuesday*, to move in Arrest of Judgment; or only till *Monday* :" that is to say, " Whether *Sunday* should or should not be reckoned as *One* of the Four Days allowed for Motions in Arrest of Judgment"—It was determined " that *Sunday* was not to be esteemed holden to be *within Time* to make such a Motion." And the Practice is the same, on both Sides of the Court; the Criminal, as well as the Civil.

Wednesday
1st Nov.
1767.

Rex versus Charles Malden.

(In the Crown-Paper.)

THIS was an Information in the Nature of *Quo Warranto*, to shew by what Authority He exercised the Office of Bailiff of *Malden*.

His Plea set forth Letters Patent of Incorporation 1 & 2 *Pb. & Mary*; which direct that the two Bailiffs should be annually elected, on the *Friday* next after the *Epiphany*: Which Bailiffs so elected, having afterwards taken their Corporal Oath before Two other senior Aldermen of the said Borough " well rightfully and lawfully to exercise their said Office for One whole Year," should be and remain in the said Office for One whole Year then next following.

He further pleads, that ever since the Grant and Acceptance of the Charter, at the Election and Nomination of Bailiffs on the *Friday* next after the *Epiphany* yearly, the Bailiffs for the preceding Year have presided, and have used and been accustomed and ought to preside.

That on *Friday* 6 G. 2. no Election was made of Bailiffs or a Bailiff. And that thereupon, on the *Day next after it*,

it, divers of the then Aldermen and Head Burgeses then having a Right to vote at the Election of the Bailiffs, and being the major Part of the then Aldermen and Head-Burgeses, did, by Virtue of and in Pursuance of the Statute in such Case lately made and provided, meet and assemble together in the Moot-Hall, for the Election of Two Bailiffs for the Year next ensuing ; and then and there proceeded to such Election : At which Meeting, He the said *Charles Malden* (the Defendant Himself,) then and there being One of the Aldermen of the said Borough, was present and did preside ; He the said *Charles Malden* then and there having a Right to vote in that Election, and being then and there the *nearest then present* in Place and Office to the Bailiff of the said Borough, and no Bailiffs or Bailiff of the said Borough for the preceding Year being then present.

Then He shews his Election at this Meeting.

Then He shews, that after his said Election, and before his Admission into the said Office or executing it, He did at the same Meeting take his Corporal Oath BEFORE *Jonas Malden William Smart* and *John Edwick* then and there being *Three OTHER* senior Aldermen of the said Borough and the *only* Aldermen of the said Borough who were present at that Meeting or Assembly, besides Him the said *Charles Malden*, " well rightfully and lawfully to exercise his said " Office of One of the Bailiffs of the said Borough for the " said Year then next ensuing ;" and was *thereupon* then and there, according to the Form of the Statute in that Case made and provided, admitted into and did take upon Himself the said Office. And so justifies and claims under this Election and SWEARING.

The King's Coroner and Attorney replies six several Matters ; and, in his Reply, takes several Issues : One of which was, " That *Jonas Malden William Smart* and *John Edwick* were *not*, nor was any of Them *next in Place and Office* " to the Bailiffs."

The Defendant rejoins, That *JONAS MALDEN*, before whom (together with *William Smart* and *John Edwick*) He the Defendant took the said Oath, was the *nearest*, then present, in Place and Office, to the Bailiffs of the said Borough, *except* Him the said *Charles Malden* ; who was the *nearest, then present*, in Place and Office, to the Bailiffs of the said Borough, and who presided at the said Assembly or Meeting, and who was elected and nominated to be One of the Bailiffs of the said Borough, as in the Plea is mentioned.

The King's Coroner and Attorney demurs to this Rejoinder : And for One of his Causes of Demurrer He shews—
That

That the said *Charles Malden* ought to have taken his Corporal Oath "well rightfully and lawfully to exercise his said Office &c. for the said Year then next ensuing," BEFORE such Officer or Person as PRESIDED at the Election as being the nearest then present at such Election in Place and Office to the Bailiffs or Bailiff of the said Borough for the preceding Year being then present.

The Defendant having joined in Demurrer,

Mr. Wallace argued for Him. But

THE COURT agreed that the Defendant was *not* properly sworn in before the PRESIDING Officer: Which is absolutely necessary where the Election is made under the Statute

* *v. ante*, of 11 G. 1. c. 4*.

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p. 292, 303.

Rex v. Roger Phillips, Mayor of Carmarthen, accord.

Mr. Justice ASTON cited *Rex versus Nance*, *Trin. 1741*, 14 & 15 G. 2. B. R. In which Case, the Court took Time to consider; and the Resolution was delivered by Lord Chief Justice LEE. They held, that the fourth Clause of that Act, (which relates to swearing-in upon Elections made under the Statute,) is general and positive (without any Exceptions or Restrictions) "that the Officer shall take the Oath "or Oaths by Law required, at the Time of his Admission, "into such Office, BEFORE SUCH Officer as shall PRESIDE "at such Election in Pursuance of the Act." There, the Court did not nor well could (as that Case was circumstanced,) enter into a Question—"Whether He could be sworn "in before Himself." Neither, indeed, is it necessary to determine it here; because it is *not* alledged "that He was "sworn in before Himself:" It is only alledged "that He "did, at the same Meeting, take his Corporal Oath before "Jonas Malden William Smart and John Edwick, then and "there being three other Senior Aldermen &c."

Per Cur. unanimously—

JUDGMENT pro REGE; (because there was no proper Swearing-in.)

V. post, (in this Term,) pa. 2135. *Rex versus Jonas Malden.*

Sharpe, qui tam, *versus* Law.

Tues. 17th
Nov. 1767.

UPON a Case reserved at *Nisi prius* at Guildhall before Lord MANSFIELD,

THE COURT held that the Statute of 32 H. 8. c. 24. continued in force, as to the *Barbers*; notwithstanding that of 18 G. 2. c. 15. which separates them from the *Surgeons*. The latter Statute only means to dissolve the *Union* between the two Companies.

Dale *versus* Sollet.

THIS was an Action for Money had and received to the Plaintiff's Use: *Non Assumpſit* was pleaded; and Issue joined.

CASE—The Defendant a Ship Broker, was the Plaintiff's Agent in suing for and recovering a Sum of Money for Damages done to the Plaintiff's Ship; and did recover and receive 2000*l.* for the Plaintiff's Use: and paid Him all but 40*l.* which He retained for his Labour and Service therein; which the Witness (Mr. Fuller) swore He thought to be a reasonable Allowance. And the Jury were of Opinion "that " the Defendant ought to retain 40*l.* as a reasonable Allow- " ance." Consequently, the Plaintiff was not intitled to recover.

The Plaintiff objected, at the Trial " That the Defendant " could not give Evidence in this Manner, of this Labour and " Service; but ought to have PLEADED it by Way of SETT- " OFF, or at least have given Notice of it as a Sett-off."

A Verdict was found for the Plaintiff; subject to the Opinion of this Court: And if the Court should be of Opinion against him, then Judgment to be entered as upon a *Non-suit*.

Accordingly, on Tuesday last, (the 10th Instant,) Mr. Dunn moved on Behalf of the Defendant, " that Judgment " might be entered against the Plaintiff, as upon a *Non-suit*; " and had a

RULE to shew Cause.

Sir Fletcher Norton, on Behalf of the Plaintiff, now shewed Cause; and insisted that the Defendant ought either to have *pledged*

pledged it, or given Notice of a Sett-off: But that he could not take Advantage of it in this Manner, without either Plea or Notice.

Lord MANSFIELD had no Doubt of the Defendant's being at Liberty to give this Evidence.

This is an Action for Money had and received to the Plaintiff's Use. The Plaintiff can recover no more than he is in Conscience* and Equity intitled to: Which can be no more than what remains after deducting all just Allowances which the Defendant has a Right to retain out of the very Sum demanded. This is not in the Nature of a Cross-Demand or mutual Debt: It is a CHARGE, which makes the Sum of Money received for the Plaintiff's Use so much less.

The Two Other JUDGES concurred.

Per CUR'.

JUDGMENT for the Defendant, as on a NONSUIT.

Wednesday
25th Nov.
1767.

Bailley *versus* Smeathman.

ON Tuesday the 10th of this Month, Mr. Cox moved to stay the Proceedings on the *Scire facias* against the Defendant's Bail, *with Costs*; the Defendant having surrendered Himself in Discharge of his Bail in due Time.

The Action was by *Original*. The Bail surrendered their Principal, within the *Appearance-Day*, but not till *after* the *Return-Day*. Mr. Cox insisted, that this Surrender on the *Appearance-Day* was a Surrender within due Time, as the Action was by *Original*.

He said it was the Course in *C. B.*; and had been also so determined in this Court. Whereupon He had a Rule to **SHEW CAUSE.**

And Master Owen now certified, that where the Action is by **ORIGINAL**, this Court proceeds by the same Rule as *C. B.* does: *viz.* that the Bail has till the *quarto Die post* (provided it be done *sedente† Curiā*).

† See Barnes's Notes 4^{to}

Edit. p. 66, Mason *wi* Bruce, and p. 75, Hansley *v.* Page.

Lord

Lord MANSFIELD—It is therefore regular.

RULE made ABSOLUTE ; except as to the Costs.

Rex *versus* Jonas Malden.

Friday 27th
Nov. 1767.

UPON an Information in the Nature of *Quo Warranto*, to shew by what Authority the Defendant claimed to be Bailiff of *Maldon*, several Issues were joined ; and the Cause was tried before Mr. Baron *Smythe*, at the last *Essex-Affizes*.

It came on, Yesterday, upon the Judge's Report, in Consequence of a Rule that had been granted upon the Motion of Mr. Serjeant *Leigh*, on Monday the 9th Instant, to shew Cause why the Verdict should not be set aside and a new Trial granted : Which was the Method thought the most proper, by the Court, for doing full and complete Justice upon the Points in Question.

There were, in all, five Issues : But the two first were quite out of the Case*. The present Question turned upon *See the the third, fourth and fifth Issues ; which were found for the Case of Prosecutor, by the Baron's Opinion ; but were, at the Trial, Charles agreed to be subject to the Opinion of this Court ; the Judge Malden, giving the Defendant Leave to move for a new Trial, without Payment of Costs.

The COUNSEL for the Prosecutor were Sir *Fletcher Norton*, Mr. *Eliab Harvey*, Mr. *Morton*, and Mr. *Shurft*. They argued, that no new Trial ought to be granted, there being sufficient Issues found, and now before the Court, upon which the Court might proceed to give Judgment against the Defendant.

The third Issue is upon his being *duly elected*; viz. "Whether the Aldermen and Head-Burgesses assembled the Day after the Charter-Day did elect Him :" which was directed and found against the Defendant. On this Issue, the first Object was, That there was *not a sufficient Number* of Aldermen ; Two of them *not being Aldermen* at the Time of his Election : And those Two appeared upon the Evidence, *not to be Aldermen* ; for, there was *no presiding Officer* at their Election. This goes to the Root of his Title.

The fourth Issue, upon the *Swearing*, was also a material Issue; viz., "Whether *Smart and Edwick*, before whom He took the Oath, were Aldermen." The Jury have found "that they were *not*." The Judge admitted Evidence to be read of the Entry of their Election to be Aldermen ; and held it

it to be void. They object, "that He ought not to have admitted it; and that it was not sufficient Evidence." This Entry entirely cut up the Title They had insisted upon by their Plea: For, it proved "that no Bailiff was present at their Election." And this fourth Issue applies to the third Issue, as it shews "that He was not duly elected; they not being Aldermen at the Time of his Election." The fifth Issue was—"That *Jonas Malden* was not Bailiff." Which, they said, was a substantial Issue, and ought to have been fully and completely proved.

The Counsel who argued on Behalf of the Defendant, were Mr. Serjeant Leigh, Mr. Thurlow, Mr. Cox, Mr. Dunning and Mr. Wallace: And their Arguments were to the following Effect.

It is found "That *Charles Malden* was the proper residing Officer;" Also "That a Majority of the Aldermen and Burgessex was present;" and "That the Majority of the whole Assembly made the Election." Also, "That He was sworn before *Charles Malden* the presiding Officer;" (although it was also before Two Others, who had no Authority to swear Him.) But the Swearing is not void, by being taken before the proper Person and Others. The Law will refer the Act to Those who had the Power to administer it. This is the Case of all Authorities. 5 Co. 89. b. Hoe's Case.

In the Case of *Souifly versus Hodgson*, (P. ante, Vol. 3. p. 1474) on an Award, the Umpire and two Arbitrators joined in the Award, though the Authority of the Arbitrators was expired; The Court held that it should be referred to the Umpire who had the Authority; yet was at Liberty to take what Advice or Opinion He pleased.

The third Issue relates only to the Election. And as He was duly elected, that Issue ought to have been found for the Defendant. A Majority of those in whom the Right of Election resided, did concur in the Election; even supposing that these two Persons were not Aldermen. But they were Aldermen; at least, *de facto*: And in a derivative Title, it is sufficient, that they were in Possession, under Colour of a Title. And, "that they were so," is proved by the Entry in the Corporation-Book, of their Election and Admission. It is objected, that this Entry does at the same Time prove "that they were not so *de jure*." The Answer is, That the Issue is here upon the Possession, not upon the Title; and Nothing more is necessary for Us to prove. However, this Entry does not prove "that the Bailiffs were not present at their Election:" They might have been present in fact; though

though their being so is not entered in this Minute. It is enough, that they were proved to be Aldermen *de facto*.

The fourth Issue is "Whether the two Persons before whom He was sworn, were Aldermen." The Swearing is alledged to be before *Charles Malden*; whom the Court must see to be the presiding Officer, as He is alledged to be the *Senior Alderman*: And although We have not indeed expressly alledged "that He *was* the presiding Officer," yet it appears "that the Oath was administered before Him and the Other Two;" and the only Issue is taken "That the Other Two were *not* Aldermen." But if They were not; yet He was sworn before *Charles Malden* the presiding Officer. The Election is quite different from the Swearing: The former is to be made by the Bailiff Aldermen, and Head Burghesses or the major Part of them; the Swearing is to be before the presiding Officer. And He was sworn before *Charles Malden*, who was so. Therefore He was properly sworn.

Consequently, He was both elected AND sworn, in a proper Manner.

As to the fifth Issue—It is either a *substantive* Issue, or a *consequential* One.

If a *substantive* Issue—Then He was *well* sworn before *Charles Malden*, the then presiding Officer: For We were not precluded from giving Evidence to prove it; as the Defendant was in the Case of *Rex versus Roger Philips**; who * V. ante, having pleaded an improper Swearing, could not be permitted to give such Evidence as would prove a proper Swearing, which He had not pleaded Here, We might have given Evidence that *Charles Malden* was the presiding Officer, and that we were sworn before Him.

If this is a *consequential* Issue—The only Question will be, "Whether the Swearing before *Charles Malden*, who is confessed, upon the whole Record, to have Authority to administer the Oath, was faulty for being administered before two other Persons also, who had not such Authority."

But, at the worst, It clearly appears upon the Record "That He was sworn before the proper Person," though perhaps We may not have pleaded it properly. Here is no *Defect* of Title: It is a Title; only, defectively set out. So that it is stronger than *Roger Philips's* Case. The Court will not suffer Matter of Form to prevail against substantial Right; especially, where the *Existence* of the Corporation depends totally upon it.

If complete Justice is to be done, We ought to have Liberty to amend our Plea, and to have a new Trial : And then They may take what Issues They think proper.

Mr. Morton, for the Prosecutor, in Reply, argued that there ought not to be a new Trial. He insisted that the third Issue is complicated with the fourth and fifth ; and that *Charles Malden* ceased to be an Alderman, when He was elected Bailiff ; and that consequently there was but *One Alderman* present if *Edwick* and *Smart* were *not Aldermen* : Therefore the fourth Issue was material. And upon the fifth Issue (which is a substantial Issue) We might have called upon Them to shew *all* the Essentials that constituted Them Aldermen ; (as a good Election, a good Swearing, taking the Oaths to the Government &c, and also the Corporation and Test-Acts.) And the Prosecutor has a Right to avail Himself of every thing that the Defendant has confessed upon the Record.

Now here is such a Swearing pleaded, as was no Swearing at all : And we had a Right, on the fifth Issue, to call upon Him to shew a proper Swearing. He ought to have been sworn before the presiding Officer at the Time of his being chosen : Whereas it appears by his own Confession, that He took the Oaths before *Charles Malden* and the Two Others, as *Aldermen*.

In the Case of *Rex versus Roger Philips*, there was in fact no such Swearing as was pleaded : But here the Swearing really was as it is alledged ; which must always be bad, both upon Plea and upon Evidence. No Evidence can make such a Swearing good : It was before these Three, as *Aldermen*.

Lord MANSFIELD—It appears by the Report, that there were but Two Objections made at the Trial of this Cause, and Two Questions started ; viz. “ Whether the Swearing could be before the Three *Aldermen* ; and 2ndly, “ Whether *Edwick* and *Smart* were Aldermen, for the Purposes of swearing Him in : ” And it was then agreed by the Counsel, to be put upon that Foot.

But the Whole of the Litigation as to the Two Aldermen was immaterial : For they had Nothing to do with it.

The Election and the Swearing are distinct Matters.

The Swearing is *not* involved in the Issue concerning the Election.

The

The fifth Issue is only consequential. In the Case of *Roger Philips*, the Election under the presiding Officer could not be gone into: For, He had not alledged that He was sworn in that Manner.

At the Trial of the present Cause, the Election was not at all objected to, upon the Foot that has been now insisted on. Why was He not duly elected? It is now said—"because Two of the Electors were not Aldermen." But Nothing was laid before the Court at the Trial, how many Aldermen were necessary to be present; or how many were actually present. It is not shewn on the Evidence, that there was not a Majority of the Aldermen present.

It is not to be taken for granted, that the swearing before *Charles Malden*, as presiding Officer, could have been given in Evidence upon the fifth Issue. But, however, (stripped of the Pleading,) The Question has never been before the Jury: And the Matter is now brought improperly before the Court.

In the Case of *Philips*, the Defendant alledged a Swearing, which was not in fact true: And the Finding and Direction in that Case were Both right. Therefore They could not properly move for a new Trial, but applied for setting aside * V. ante, the Verdict, and a Repleader*. The Court thought that p. 295. setting aside the Verdicts, and giving the Defendant Liberty † V. ante, to amend his Plea, was a better Method‡: And that Method p. 304. was accordingly there taken ‡ V. ante, p. 306.

If We grant a new Trial here, They will have it in their Power to apply for an Amendment or not, as They think proper.

If the Swearing was in fact an improper Swearing, that will appear upon the Record: And Judgment could not in such Case be for Him; because his Title would appear to be a defective One.

Therefore—Let there be a new Trial, *without Costs*.

Mr. Justice ASTON said, He could not conceive how the third Issue could be found against the Defendant.

How does it appear upon this Record "that *Charles Malden* and *Jonas Malden* were not the Majority of the Aldermen for the Time being?" It does not appear but that They Two were the only existing Aldermen: And it does not appear but that the Defendant was well elected.

The Swearing is a quite different Matter from the Election. The Defendant is obliged to shew a complete Title: And He here concludes, that "so He had a good Title." The King's Coroner may traverse all the Particulars, if He thinks fit: But if He does not, All that is well pleaded by the Defendant is admitted.

The Defendant has here alledged that He took the Oaths before the presiding Officer; though indeed He adds—"and before the Two Others," (who were not so.)

On the fifth Issue, which is consequential, the Prosecutor can not give in Evidence Defects of Title not mentioned in the Pleadings.

Therefore if the Issue upon the Election is found wrong, that Issue is also found wrong.

Whether They will apply to amend or no, is no Part of the present Consideration: They may do as They think proper. But I think We ought to set aside this Verdict, and grant a new Trial.

The Case of *Philips Mayor of Carmarthen*, was not like this Case.

* *Rex v. Goldwyer's Case*,^{*} the Fact of the Person presiding being a good Mayor, or only a Usurper, was put in Issue: And though the Court did not give an explicit Opinion "whether the presiding of an Officer *de facto* was sufficient to make a Title in the Defendant against the Crown," yet if He had been an Officer *de facto*, (and not a mere Usurper,) they strongly inclined that the Presence of a Mayor *de facto* recently prosecuted, and against whom Judgment of *Ouster* had been obtained, would not be sufficient to authenticate the Defendant's Election.

But I give no opinion on this Point.

He thought that a Swearing before *Charles Malden* as presiding Officer could not be given in Evidence on the last Issue, as the Pleadings now stand.

† The Other Two Judges were Both absent. Upon the Whole, He concurred with Lord MANSFIELD, That there ought to be a new Trial.

RULE MADE ABSOLUTE for setting aside the Verdict, and having a New Trial.

Jeffer *versus* Gifford.

THIS was an Action for erecting a Wall, whereby the Plaintiff's Lights were obstructed.

The Declaration contained Two Counts: In the Second, the Plaintiff counted as the *Reversioner*. And a Verdict had been given for the Plaintiff, and general Damages.

On the second Day of this Term Mr. Serjeant *Burland* moved in Arrest of Judgment; and had a Rule to

SHEW CAUSE.

His Objection was—that this Action will not lie by a *Reversioner*; being only an Injury to the Person in *Possession*.

Mr. Justice *Aston* now said He had looked into it, and had found a Case S. P. with the present; and accordingly cited *Tomlinson versus Brown*, as of H. 28 G. 2. but it was determined in *Easter Term 1755*. It was an Action brought by the Owner of the Inheritance, for a Nuisance in obstructing Lights and breaking his Wall. A general Verdict for the Plaintiff. Mr. *Norton*, in Arrest of Judgment, objected that a temporary Nuisance can't be an Injury to the Inheritance: It may be abated before the Estate comes into Possession: And he cited *Cro. Jac. 231. Some versus Barwif*; and observed, that if this would hold, the Defendant would be liable to a *double Action*; One, by the Possessor of the Estate; the Other, by the Reversioner. Mr. *Crowe* shewed Cause on behalf of the Plaintiff; and insisted that it was a Damage done to the *Inheritance*: If the Reversioner wanted to sell the Reversion, this Obstruction would certainly *lessen the Value* of it. The Court were of Opinion, that an Action might be brought by One, in Respect of his Possession; and by the Other in Respect of his Inheritance, for the Injury done to the Value of it.

Lord *MANSFIELD*—That is decisive.

WHEREUPON,

The RULE was DISCHARGED.

Rex *versus* Norris.

SIR Fletcher Norton moved for a Rule to bring up the Defendant to be discharged as an *Insolvent Debtor*.

He had been convicted of *Perjury*; and (*inter alia*) fined 100*l.*

Lord MANSFIELD—This is not a *Debt*, but a *Punishment*.

MOTION DENIED.

The End of *Michaelmas Term 1767, 8 G. 3.*

Hilary Term

8 Geo. 3. B. R. 1768.

N. B. There were only Three Judges of this Court, at the Opening of this Term; viz. Lord MANSFIELD, Mr. Justice YATES, and Mr. Justice ASTON: The Fourth Seat was vacant, by the Promotion of LORD LIFFORD to the Chancellorship of *Ireland*; and Mr. Justice WILLES, who succeeded him here, did not take his Place upon this Bench, till the 27th of this Month.

Saturd. 23d
Janu. 1768

Rex *versus* John Leigh Esq. Mayor of Yarmouth
in the Isle of Wight.

MR. Serjeant *Burland* shewed Cause, on Behalf of the Prosecutor, against a Rule which had been obtained by Mr. Serjeant *Davy* (on Monday 9th November 1767,) to shew Cause why the Judgment against the Defendant should not be arrested.

It was an Information in Nature of a *Quo Warranto*. Twelve Issues were taken: Five of them were withdrawn by the Prosecutor.

The Defendant claimed the Office under two *Titles*; viz. under a *Prescription*, and also under a *Charter*: But He had, by his Plea, put his Defence upon his Claim under the *Prescriptive Right*; which was tried, and found against him.

Serjeant *Davy* alledged, that it appeared upon the Face of the Record, taking in the Whole of the Pleatings, "that
"the

" the Defendant had a good Title under the CHARTER :" And therefore if he could not have Judgment for him, yet at least there could be no Judgment *against* him, notwithstanding the Finding of the Jury upon his prescriptive claim.

He insisted, that though it had been objected " that the Defendant had put his Defence upon a Title under a Prescription ; yet it appears upon the *whole Record* " that " He had a Title :" For He has alledged " that He was chosen by a Majority of those who assembled upon the Charter-Day." And the Charter appears upon the Record : And upon the *Construction* of it, it was not necessary that He should be chosen by a Majority of the whole Number of the Electors *in being*.

To this Serjeant *Burland* answered, That the Defendant can not go into the *Construction* of the Charter ; because, upon this Record, the Defendant *finds his Title upon Prescription* ; and denies the Charter : Therefore, as the prescriptive Title is found *against* him, He can not resort to the Charter, of which He has denied the very Existence.

Serjeant *Davy* replied.—That the Defendant does not find his Title upon Prescription *only* ; (though He acknowledged " that He denied the Acceptance of the Charter :") But upon the *whole Record*, it plainly appears that there was a mode of Election directed by the Charter ; and that He was elected agreeably to the Directions of it ; and therefore there ought to be either an *Arrest of the Judgment*, or an Award of a *Repleader* on Account of the Immateriality of the Issue.

Lord MANSFIELD (to Mr. Serjeant *Davy*) It is too strong for you. You have departed from the Title you have set up : And the Issues are not immaterial. The Judgment must follow the Title set up by the Defendant against the Crown : He can not say, in general, " That He was *duly* elected."

Mr. *Turklow* and Mr. *Walker*, who were also Counsel (with Serjeant *Davy*) for the Defendant, still urged that the Court could not give a positive Judgment against the Defendant, when it appears to Them upon the Face of the whole Record, " that the Mover of the Suit has no Cause to sustain " it ; not even if the Defendant should confess the Action. And to prove this, they cited the Opinion of *Coke* Chief Justice, in * *Tilly and Wody's Case*, 7 Ed. 4. 31. " that in *no Case* where it appears that a Man has no Title to recover, shall He ever have Judgment to recover. And even if the Defendant would in such Case suffer Judgment, yet the Court is the " ought not to give it : For, they never ought to give Truth,

* Note.
This Case
is often er-
roneously
cited with
Regard to
the Year
and Page :
7 E. 4. 13.

" Judgment,

" Judgment, but where it appears to them that the Plaintiff
" has Cause to have Judgment."

And this Reasoning is equally applicable to Informations in Nature of *Quo Warranto*, where the Crown appears to have no Cause of Suit, as it is to a Plaintiff who has no Title to recover.

They also cited Dr. Bonham's Case, 8 Co. 114 & 121. b. as laying down the proper Distinction ; and which is express " that the Plaintiff shall never have Judgment, when it appears that He has no Cause of Action." So also is the Case of *Butterfield versus Marshall*, in 1 Lutw. 608. The Chief Justice says—" That admitting the Bar not to be good, yet in as much as it appears that the Plaintiff, by his own Shewing, has no Cause of Action, he can not have Judgment :" And so was the Opinion of the whole Court. p. 609.

Turner's Case, 8 Co. 133. b. was also cited by them, as laying down and confirming the same Doctrine ; and proving that if a Defendant pleads an insufficient Bar ; and the Plaintiff goes on, and shews that the Bar is insufficient, and that the Defendant has no Title ; yet He shall not recover, if it appears upon his Replication " that He has no Cause of Action."

Here, the Defendant has pleaded a prescriptive Title : which is fallen to the Ground : It is found against Him. But it appears upon the Record, " That there was a regular Assembly holden ; and that the Defendant was duly chosen a Chief Burgees at it ; and afterwards, duly elected and sworn Mayor." This would have been a Title under the Charter, which is set forth upon the Record. Therefore Judgment can not be given for the Prosecutor : For, the Court fees, upon the Whole, that the Party who prays this Judgment has no Title to it. The Charter is set forth in the Replication : And the Defendant appears to have been elected agreeable to it. All this appears upon the Record.

Mr. Walker cited some Cases of the Court's having awarded Repleaders after Verdict ; particularly, *Love versus Wotton*, in Cro. Eliz. 245. and an anonymous Case in *Comyns* 148. and the Case of *Roger Philips*, Major of *Carmarthen*, (ante, Vol. i. p. 292) And He proposed, that the Defendant should have Liberty to amend his Plea, or to plead *de novo*, on Payment of Costs.

Lord MANSFIELD asked if They could cite any Case where Judgment had been refused to the Crown upon an Information

Information in Nature of *Quo Warranto*, where the Defendant failed in the Title He had set up.

And it seemed acknowledged, that there was *None*.
At least, *None* were mentioned.

Whereupon His LORDSHIP proceeded to observe, that in Civil Cases, if the Plaintiff has no Cause of Action, He can not have Judgment.

But *this* Manner of proceeding is quite different. For if the Defendant has usurped the Franchise without a Title, the King must have Judgment. The Defendant therefore is obliged to shew a Title: And the King has no need to traverse any Thing but the Title set up. If any One material Issue is found for the Crown, the Crown must have Judgment.

He added —

I do not see how here could be a Repleader: For, in Repleaders, you begin with the first Fault. Now here, the whole Defence is wrong. And there don't appear to be any Slip or Mistake: Nor has there been any Motion for an Amendment or Repleader in this Case.

In the present State of it, I have no Doubt that you can not stop the Crown from having Judgment.

Mr. Justice YATES—If the Plea contains no Title against the Crown, there must be Judgment for the Crown.

In Civil Actions, the Plaintiff must recover upon his own Title: In Case of Information in Nature of *Quo Warranto* for Usurpations upon the Rights of the Crown, the Defendant must shew that He has a good Title against the Crown.

Sir Fletcher Norton, *pro Rege*, here observed, that the Court could not grant a Repleader: For, that would be giving the Defendant an Opportunity to plead double; which the * Act of Parliament disallows.

*See 4 & 5
Ann. c. 16.
sect. 4. and

9 Ann. c. 20. sect. 7. which extends the former to "all Writs of Mandamus, and Informations in Nature of a Quo Warranto, and Proceedings thereon, for any the Matters in the latter Act mentioned:" But not so as to have Liberty to plead more Pleas than One, even with Leave of the Court. This was determined in Trinity Term 1753, 26 & 27 G. 2. B. R. in Two Cases; One, Rex v. Newland, Common-Council Man of Carmarthen; the Other, Rex v. Briscoe, Bailiff of Hailemore.

Lord MANSFIELD—And in the worst Way, too.
This is decisive.

Mr.

Mr. Justice YATES proceeded—The Defendant in *Quo Warranto* is called upon to shew his Title ; to shew “*Quo Warranto* He claims the Franchise.” He accordingly shews his Title. The Crown are only to answer this particular Claim. He must at once shew a *complete* Title. If He fails in it, or in any Chain of it, Judgment must be given against Him. Here, the Defendant has set up a particular Title : This Title, upon which He grounds his Claim to the Franchise, is found against him. He can not *now* depart from it. Therefore the Crown is here intitled to Judgment.

Mr. Justice ASTON concurred in Opinion ; and had no Doubt at all. There could be no Pretence, He said, of Judgment for the Defendant : For, it don’t appear that He could have made a Title, at all ; and that which He set up, is found against Him.

In the Case of *Rex versus Philips*—It was only a *defective* setting forth of the Title : He really had a good One.

Per Cur.

RULE DISCHARGED.

See the Case immediately following this Case.

Rex versus Grimes.

Rex versus Blatchford.

(See the last Case.)

Monday
25th Jan.
1768.
(All Three
Judges pre-
sent.)

SEVERAL other Corporators having pleaded the like Pleas as in the Case immediately preceding this ; and the Issues having been ready to go down to Trial at the same Assizes with the former, but *not* having been actually tried ; the Defendants had moved to withdraw their Pleas, and to plead *de novo*, on Payment of Costs and the Prosecutor’s having Liberty to reply *de novo*. Cause was now shewn against this. But

THE COURT granted it, without even hearing (a second Time) the Counsel for the Defendants ; upon Payment of Costs, pleading within a Week, taking short Notice of Trial, and with Liberty to the Prosecutor to reply *de novo*.

And

And this they did, *without* Affidavit of any particular Circumstances, or any particular Reasons given for this Amendment: For, Lord Mansfield said it was sufficiently hard upon a Defendant, who might be doubtful "whether his Election" could be best supported under a Charter or under a Prescription, "to be obliged by our Law, to make his Election under which of them He would defend Himself by his Plea, and to desert the other Title, instead of having an Opportunity to take the Benefit of Both: But it was surely reasonable that if He discovered, before Trial, that He had pitched upon the wrong Defence, He should be at Liberty, upon Payment of Costs and other proper Terms, to quit that weaker Defence, and insist upon the Other which would better support his Claim to the Franchise.

The RULE was made ABSOLUTE, with the Addition above particularized.

Tues. 26th
Jan. 1768.

Dally *versus* Smith.

A Question was reserved at *Nisi prius*, (by giving the Defendant Leave to move to set aside the Verdict, and enter a Judgment of Nonsuit thereupon,) "Whether a BUTCHER was a Person who *sought his Living by buying and selling* within the Meaning of the Acts concerning Bankrupts."

THE COURT, though they expressed themselves very sensible of the Inconvenience of extending the Bankrupt-Laws to *Artificers* whose Living is substantially gotten by mechanical Labour, with a Mixture of buying and selling; yet thought, upon Authority of Cases, that they *must* hold a Butcher to be within that Description which makes a Man liable to a Commission of Bankruptcy.

And therefore

THE RULE for shewing Cause "why the Verdict should not be set aside and a Judgment of Nonsuit entered," was DISCHARGED.

V. 13 Eliz. c. 7. 1 J. 1. c. 15. and 21 J. 1. c. 19.

See also *Cro. Car. 31. Crampe versus Barnes.*

Barnes

Barnes *versus* Foley.

THIS was a special Case reserved at *Nisi Prius*, upon the Trial of an Action brought by an Inhabitant of *Bath* against the Defendant who demanded, and received of him, a Halfpenny a Letter more than the settled Rate of Postage.

The Point meant to be settled, was, "whether the Post-Master was obliged to deliver out Letters sent by the General Post, at the respective HABITATIONS of the Persons residing in that City to whom such Letters were addressed, for the mere Rate or Price settled by Act of Parliament;" Or, "Whether it was incumbent upon such Persons, to come or send to the Post-Office, to inquire after and fetch their Letters, in case they insisted upon not paying any more for them than the strict Rate allowed by Act of Parliament, and refused to make any Compensation whatsoever for the Trouble of carrying them out and delivering them at their respective Habitutions."

It happened, nevertheless, that this Point still remained unsettled; as the present Action was brought for the Recovery of the Money which had been illegally demanded and taken, (which could not be justified;) and not for the Injury of detaining the Letters, and refusing to carry out and deliver them.

Perhaps, therefore, it is scarce necessary to state more of this Special Case, than that it appeared therein, that the Post-Master of *Bath* had published an Advertisement, "that such Persons as chose to SEND to the Post-Office there, for their Letters, might have them delivered THERE: But such Persons as chose to have them delivered at their own Places of Habitation must PAY a HALF-PENNY for EACH Letter so delivered at their Place of Habitation."

However, though I have not the exact literal State of the Case at present in my Possession, I mean to insert it hereafter; and shall specify the particular Page where it will be inserted, both in the Index of Names of Cases, and also in the Table of the Principal Matters, under Title "Letters."

It was argued, on Friday the 15th of May 1767, by Mr. Mansfield for the Plaintiff, and Mr. Serjeant Davy for the Defendant.

THE GENERAL QUESTION was, "Whether the Post-Master was obliged to deliver Letters to the Inhabitants of and

" and Residents in *that*, at their known *Places of Abode*, at
 " the Rate fixed by the several and respective Acts of Parliament;
 " or can demand a further Consideration or Compensation
 " for the Labour of so carrying out and delivering them:"
 For, as to the particular Sum demanded, (a Half-penny,) it
 was not objected to as unreasonable, in Case He had a Right
 to make any Demand at all.

Mr. Mansfield argued that He was obliged to deliver the Letters abroad, at their respective Habitations, at the fixed Rate, without any additional Charge.

He confined Himself to the Delivery of Letters *within the Post Towns*; not meddling, at present, with the Delivery of them at a *Distance* from such Towns. He cited rehearsed and observed upon the different Acts of Parliament relating to the Post-Office. The 12 C. 2. c. 35. was the first Act to erect a Post-Office. Then came the 9 Ann. c. 10. of which He selected the following Sections, *viz.* § 6, 17, 22, 31, 39, 40. The 4 G. 2. c. 33. gives the additional Penny to the Penny-Post. And 5 G. 3. c. 25. § 4 & 13. expressly mentions where any additional Charge is to be made. And no other, He said, could be imposed without legal Authority.

He then argued from the great Inconvenience that must arise to every Person that might have Reason to expect Letters; in Case the Post-Master was under no Obligation to send them out to their respective known Habitations; and the infinite Confusion that would happen even at the Post-House itself in populous Towns, from the Crowds of Inhabitants continually resorting there to inquire for Letters. And He argued that the particular Rates and Payments fixed by the sixth Section of 9 Ann. c. 10. and the Caution of 4 G. 2. c. 33. about the additional Penny, and of the 5 G. 3. c. 25. where any additional Charge is to be laid on, shew it to be the Intention of Legislature, that no such Encroachments should be made, as are now attempted: At least, a strong Presumption arises from them. And the Smallness of the Sum at present demanded would make no Difference in the Case. But, however, a Half-penny bears a great Proportion to the whole Rate (of 3d. or 4d.) It may, in some Places, amount to 400l. or 500l. a Year. And if They have the Power to demand any Thing at all, it will be in their Power to encrease it *ad libitum*; and so to raise a Tax upon the Subject, at their Discretion.

Mr. Serjeant Davy, contra, for the Post-Master, insisted that it is no Part of his Duty to carry the Letters a Yard further than the Post-Office of the respective Post-Town. He owned

owned this to be a Point defended by the *Post-Master-General*; and that it was considered as a general Question, not confined to *Bath* alone.

Many Post-Offices are in exceeding small Villages; not in large Towns. These would be clear of Inconveniences suggested as possible to happen in populous Places.

The Post-Office may indeed send them out, if they think it to their Advantage: And it would be very inconvenient in *London*, not to send them out. Many Merchants of *London* do, however, fetch their own Letters. But in Country Towns it might be exceedingly inconvenient to the Post-Master, to send out Letters to considerable Distances from the Post-House.

He mentioned 9 *Ann. c. 10.* § 6, 11, 31. and 1 *G. 3. c. 25.* § 8. as favouring his Side of the Question; and observed, that the Words “*Office*” and “*Stage*” are used as synonymous Terms, through all the A&ts; that the Rates are settled according to the Distance in Miles; and that the Miles are computed from Stage to Stage. Now if a Man lives, in a great Town, somewhat farther from *London* than the Post-House of such Town, He ought not to have his Letters sent to Him at such his Habitation, unless they were to be charged more than He would be obliged to pay if He sent to the *Office* for them.

This same Question has been tried before, in a Case between *Green* and *Hopper*, in *Durham*, at the Summer-Affizes 1761. And the Judge, after Argument, determined “that it was “not the Duty of the Post-Master to send them out.”

Mr. Justice YATES said—The *Bar* were not satisfied with the Determination.

Mr. Serjeant Davy argued, that if Post-Masters were obliged to send out Letters *within* Towns, it would follow “that “They would be likewise obliged to send them *out of* Towns.”

Mr. Mansfield, in his Reply, denied this.

He also denied the Words “*Stage*” and “*Office*” to be synonymous: *Stage* comprehends the *whole* Town. The *Houses* are often changed: The *Stages* are not. It would be very hard, He said, if a Man’s Letter, who lives, in a great Town, somewhat *beyond* the Post-Office, a little further on from *London*, should be liable to be charged a Penny more; and yet that He should be obliged to *send* to the Post-House for it.

The

The Practice of the General Post-Office in *London* shews their real Sentiments about this Matter.

Lord MANSFIELD inquired if there was any Regulation made about this Matter, by the Post-Master-General. 2dly. Whether this additional Money is accounted for to the public Revenue, or not. 3dly. Whether the Post-Master ~~himself~~ can receive this additional Charge, as a *Rate*, (though his Servant might be permitted to receive it as a *Gratuity*,) even although the Person of whom He took it should consent to pay it: For, if He may, it impowers Him to raise whatever He pleases. This is a *new Thing*: How come They now to publish such an Advertisement?

N. B. Nothing is taken in *Bristol*, (as was attested by Mr. Dunning;) nor in *Lancaster* and *Liverpool*, (as was declared by Mr. Justice Yates:) Yet in the Case of *Green versus Hopper*, some other Towns were mentioned, where it was practised.

Lord MANSFIELD—The whole Revenue ought to go to the *Crown*; none of it, to the Post-Master: And the Crown are to be at the whole Expence. This Practice would raise an immense Sum, in populous Towns.

ULTERIUS CONSILIIUM.

Upon this Matter being now mentioned again—

Lord MANSFIELD took Notice, that the *principal Question* is upon the *Charge*. Therefore, unless the Post-Master can support a *Right to impose such a Charge*, there is an End of the Action.

The Post-Master has published an Advertisement “ that all such Persons as chose to send to the Office, might have their Letters, at the settled Rate, upon *sending* for them: But such Persons as chose to have them delivered at their Places of Habitation, MUST PAY a Half-penny for each Letter.”

His LORDSHIP declared He would not, upon the *present Action* and special Case, give a judicial Opinion upon the Question “ Whether the Post-Master was or was not obliged to deliver out the Letters to all Persons to whom they were addressed, inhabiting *within* the City of *Bath*.”

The

The right Method of bringing *that* Question before the Court, is, for some Inhabitant of Bath to bring an Action against the Post-Master for not sending his Letters to his House.

Sir Fletcher Norton, for the Post-Master, said He would not pretend to argue upon the Foot of the Post-Master's having a *Right to DEMAND a further Price* for the Letters, than the Acts of Parliament allow.

Whereupon,

THE COURT only declared as follows—

Upon this Case, as at present stated and left to Us, there must be a RULE,

That the POSTAGE be delivered to the PLAINTIFF.

N. B. The Point intended by both Parties to have been now settled, remained consequently undetermined: And the Council on both Sides agreed that They must think upon a Method of bringing it *properly* before the Court.

Afterwards, in Easter Term 11 G. 3. on the 26th April 1771, it was determined by this Court, in a Case of Stock, One £c, against Harris, Deputy Post-Master of Gloucester, " that the Post-Master was obliged to deliver the Letters to the Inhabitants of that City, *at their Houses.*" But there, indeed, such a Usage had prevailed for a great Length of Time. And I am informed by a learned Serjeant, That in Trin. 13 G. 3. there was a Determination in C. B. between Rowning and Goodchild, which fully settles the Point. It was a Case reserved, upon an Action for Money had and received for the Plaintiff's Use. It was stated, that before the Year 1741, Letters by the London Post, directed to Persons living in Ipswich, were delivered *at their Houses*, on paying the legal Postage: But that One Penny was paid, over and above the legal Postage, for Letters by the Cross-Post; which were delivered at a different Time of the Day. That in the Year 1741, Notice was given by the Deputy Post-Master " that for the future, a Half-penny over and above the legal Postage was to be paid for every Letter delivered at any House in Ipswich :" And that a Half-penny for every Letter so delivered has been since paid to the Deliverer of the Letter, *for his own Use.* The Question submitted to the Opinion of the Court was, " Whether the Deputy-Post-Master of Ips-

" which was bound to deliver Letters at the Houses of Persons living in Ipswich, on paying the legal Postage only." After twe or three Arguments and taking Time to consider, it was unanimously holden " that He was." And Lord Chief Justice De Grey said, it had been the Practice for many Years, to deliver Letters at the Houses of Persons residing in London, York, Bristol, and divers other Towns, on paying the legal Postage only: And as there is the same Reason for doing it in all other Post-Towns, the Law ought to be the same in All.

Wednesday
27th Janu-
ary 1768.

This Morning, EDWARD WILLES Esq. his Majesty's Solicitor General, kissed Hands for the Succession to LORD LIFFORD, as *puisne Judge* of this Court: And

JOHN DUNNING of the Middle Temple Esq. kissed Hands on being appointed *Solicitor General*, in the Room of Mr. WILLES.

Friday 97th Mr. WILLES went out Serjeant, alone. But He did not Jan. 1768. take his Seat upon the Bench, till Monday the first of Februa-
ry.

Clements, Esq. and Others, Executors of Dr. Baldwin, *versus* Waller, Esq.

THIS was upon a Writ of Error from B. R. in Ireland; where Judgment had been given for the Plaintiff Waller, Lessee of Dr. Baldwin late Provost of the College of Dublin, in an Action of Covenant brought there by Mr. Waller, against the Executors of Dr. Baldwin; and the Plaintiff had taken his Judgment against the Executors *de bonis propriis*.

The Short of the Fact was, That Dr. Baldwin, the late Provost had made a Lease to Mr. Waller, his Executors Administrators and Assigns; reserving the Rent to Dr. Baldwin and his Successors: And Waller had covenanted to pay the Rent to Dr. Baldwin and his Successors.

Dr. Baldwin, on the other Hand, had covenanted for Himself and his Successors, with Waller, his Executors Administrators and Assigns, to warrant and defend the Premises against Himself and his Successors. The Rent reserved was less than the Moiety of the *true yearly Value* of the Estate demised by the Lease.

Dr. Baldwin died. Dr. Andrews succeeded Him, as Provost; and brought his Ejectment against Waller, the Lessee; and

and evicted Him. Whereupon He brought this Action against the Executors of Dr. Baldwin, upon Dr. Baldwin's Covenant. They craved Oyer of the Lease, and pleaded the Act of the Irish Parliament of 10 & 11 C. 1. c. 3. § 2. which gives Power to Governors of Colleges &c, to demise for 21 Years, reserving "so much yearly Rent or Profits, or more, "at the Peril of the LESSEES who shall take the same, as the Moiety of the true Value of the said Lands &c, (communibus Annis,) at or immediately before the Time of the making of such Lease shall amount unto." To this Plea, the Plaintiff Waller demurred: And the Court of King's Bench in Ireland gave Judgment for him. Upon which, the Executors of Dr. Baldwin brought the present Writ of Error.

The QUESTION now litigated was, "Whether the Action could be maintained against the Executors of the late Provost, upon his Covenant for Himself and his Successors, to warrant and defend &c; in which Covenant his Executors were not named."

Mr. Wallace, for the Plaintiffs in Error, argued in the Negative. The Executors of Dr Baldwin are not bound, he said, by this Covenant. His Interest was only a Life Estate, as Head of the College: And he only binds his Successors, not his Executors or Administrators. He could not mean to bind them: For, the Rent is reserved to Himself and his Successors; not to his Executors. They had no Concern in the Matter: His Interest ended with his Life. Besides, The Invalidity of this Lease was the Fault of the Lessee himself. The Words used in this Irish Act are not to be found in any of the English Acts. It directs the Reservation to be of not less than a Moiety, at the Peril of the LESSEE." Therefore it was incumbent upon the Lessee to see that a Moiety was reserved: And he has no Right to come upon the Executors of Dr. Baldwin, when the Fault was his own.

But supposing that the Plaintiff Waller had a Right to sue Dr. Baldwin's Executors, yet this Judgment in Ireland is erroneous: being *de bonis propriis*. It ought to have been—*de bonis Testatoris*. A Judgment in Covenant against an Executor ought to bind the Effects of the Testator only; even for a Breach of Covenant in the Time of the Executors: As is fully settled in Hob. 188. *Collins versus Thoroughgood*; and Cro. Jac. 671. *Bridgman versus Lightfoot*.

Mr. Ashurst, contra, (for the Defendant in Error) acknowledged several Inaccuracies: But the single Question in Ireland was—"Whether the Executors of the late Provost are

" liable to the Action ; the Premisses having been recovered
 " by the present Provost, against the Lessee, the Plaintiff
 " there, for Want of the Reservation of the proper Rent."

This Covenant of Dr. Baldwin's is *not* binding upon his SUCCESSORS : Therefore the Intention of the Covenant must have been " that the Doctor should take the Peril upon Himself and his Executors, of the Lands being evicted from the Tenant for Want of a full Moiety being reserved :" And the Covenant shall be taken most strongly *against* the Covenantor. Consequently, the Executors are bound by this Covenant. The Successor is the very Person *against* whose Claim the Covenant is intended to secure the Lessee. Executors shall be bound by a Covenant, though not named : Especially, in an express Covenant of Warranty ; where the Thing continues after the Death of the Covenantor.

As to this Judgment being against the Executors *de bonis propriis*—He admitted that it ought to have been *de bonis Testatoris*.

However, this may be set right here, under the Statutes of Jeofails. For which, He cited 2 Lev. 22. Chapman versus Gale. And that Case was after Verdict and Judgment: This is after Demurrer, only. And Pool versus Longuevill et al'. in 2 Saunders 289. is a strong Case of an Amendment after a Writ of Error.

Mr. Wallace—All the Judgment that this Court can, in the present Case, give, is " to reverse the Judgment ;" because this Writ of Error is brought by the Defendants. The Distinction is laid down, in the Case of Parker versus Harris, 1 Salk. 262. That where the Plaintiff brings Error, the Court shall give Judgment as the Court below should have given : But where the Writ of Error is brought by the Defendant, there shall only be Judgment to reverse the former Judgment ; because the Suit is only to be *eased* and *discharged* of that Judgment.

In Reply to Mr. Ahurst, He admitted the Intent of the Act of Parliament to have been to prevent the Covenantor from binding his Successor, unless a Moiety of the true yearly Value was reserved. But this is the real Fault of the Lessee : He must have known the true yearly Value ; because this Lease was made upon his surrendering an old one.

And as to setting the Judgment right by an Amendant—The Answer is, that a Judgment in Ireland cannot be amended here.

Lord

THE COURT denied this ; and cited the Case of *Berne versus Berne**, as an Instance of its being done.

* It was in
M. 1734, 8
G. 2. B. R.

in Error from Ireland, on a Judgment in an Action of Dower. It was amended in-
stanter, according to my Note ; and Judgment affirmed. And the like Amendment
was afterwards made, on Mr. Denison's Motion, and after very solemn Deliberation
in Easter Term 1741, 14 G. 2. in a Case of *Thompson v. Slicer*, on a Writ of Error
from Ireland, in an Action upon a Promissory Note.

Lord MANSFIELD—This Case will not turn upon the Form : For it is clear upon the Merits. The Words of the Act of Parliament are, “ that it shall be at the Peril of the ‘‘ Lessee.” The Lessee knew the Value ; because, to obtain this Lease, He surrendered an old One. The Lessor might not know the Value. The Act imposes the Risque upon the Lessee ; and says, his Lease shall be void, unless made pursuant to that Act, which requires a Moiety of the true yearly Value to be reserved, and which was not here reserved.

Mr. Justice YATES—The Lease is void. It is in the Teeth of the Act of Parliament : And the Act is express, “ that the Reservation shall be at the Peril of the Lessee.” Besides, this Judgment is erroneous, as being against the Executors *de bonis propriis*.

Mr. Justice ASTON agreed, that it was clearly contrary to the Act of Parliament. The Act meant to prevent the Tenants from concealing the true Value of the Lands : And it is express “ that it shall be at the Peril of the Lessee.”

Per Cur'. unanimously—

JUDGMENT reversed.

Harris *versus* Barnes, et Al'.

Wednesday
3d Feb. 1768

THIS was a Case out of Chancery, upon the Will of George Coningesby D. D. who, being seised in Fee of the Manor of Grendon Warren &c in the County of Hereford, on the 15th Feb. 1765, made his Will ; in which (*inter alia*) are these Words—“ I give and devise my Manor of Grendon Warren in the County of Hereford, and my Farm Lands and Premises called Grendon Warren in the Occupation of the said James Stone, and all my Estate called Little Hegdon alias Hegthorn, lying within or near to Grendon Warren aforesaid, also All other my Freehold Estates Lands and Premises lying and being at Grendon Warren aforesaid or in any other Parish or Place within the said

“ County

" County of Hereford, unto my Kinsman *Coningesby Harris*,
 " of the Parish of *Claimes* in the County of *Worcester* Gen-
 " tleman, for the Term of 90 Years from my Decease, if
 " the said *Coningesby Harris* shall so long live: And after
 " the Determination of that Term, I give and devise all the
 " said Premisses in the County of *Hereford* unto the *Heirs of*
 " the *Body of the said Coningesby Harris*. And in Default
 " of such Heirs, I give and devise All my said Estates and
 " Premisses in the County of *Hereford* unto my Cousin Mrs.
 " *Susan Elletson*, for the Term of 90 Years if the said *Susan*
 " *Elletson* so long lives, and to commence from the Decease
 " of the said *Coningesby Harris*, He dying without Issue:
 " And subject to the Estates and Contingencies before men-
 " tioned, I give and devise All my said Estates in the Coun-
 " ty of *Hereford* unto *Roger Elletson Esq.* Son of my said
 " Cousin *Susan Elletson*, for and during the Term of his
 " Life; and from and after his Decease (subject to the De-
 " vises aforesaid) I give all my said Estates and Premisses in
 " the County of *Hereford* unto the first and every other
 " Son and Sons of the body of the said *Roger Elletson*, and
 " to the Heirs Male of the Body and Bodies of every such
 " Son lawfully issuing;" with several Remainders over.
 And after directing all his Legacies Debts Funeral Expences
 &c, to be paid out of his personal Estate, He goes on—
 " And after such Payments, that my said Trustees apply
 " the Residue and Remainder of my said personal Estate, in
 " purchasing Lands Tenements and Premisses in Fee Simple
 " lying in the County of *Hereford*; such Lands Tenements
 " and Premisses to be conveyed to and vested in the Trustees
 " named in his Will their Heirs and Assigns, IN TRUST to
 " and for and upon the same Uses Limitations Persons and
 " Purposes that my said Estates in *Herefordshire* are by me
 " before given or devised or stand limited by this my Will,
 " and consistent with the Contingencies happening in the
 " mean Time: And for the Trusts and Purposes before men-
 " tioned relating to my personal Estate, I give and devise
 " unto the said Trustees (naming them) their Heirs and
 " Assigns all my Freehold Estate and Title I have in any
 " Mortgage or Mortgages in Fee, and the Fee and Free-
 " hold and all my Right of and in all such mortgaged Es-
 " tates and Premisses."

The said Testator Dr *Coningesby* died on or about the 15th
 Day of *March* 1766, without altering or revoking his said
 Will, (except that by a Codicil, dated the 20th of *February*
 1766, He gave 80*l.* to his Servant *John Wainbridge*,) with-
 out Issue; leaving the Defendant *Elizabeth Barnes* his only
 Sister and Heir at Law.

The

The Executors duly proved the Will, and took upon themselves the Burden of the Execution thereof.

The Plaintiff *Coningeby Harris*, the first Devisee in the said Will named, of the *Herefordshire* Estates, soon after the Death of the said Testator, entered and took Possession thereof; but hath no *Issue* of his Body.

Mrs. *Susan Elletson*, the next Devisee of the said *Herefordshire* Estates, survived the said Testator, and is lately dead, leaving *Roger Elletson* her only Son and Heir at Law.

The said *Roger Elletson*, the next Devisee of the said *Herefordshire* Estates, is now living; but hath not any Child.

The Monies and Securities for Money, Arrears of Rent, and other personal Estate directed by the said Will to be laid out in the Purchase of Lands, and settled to the same Uses with the *Herefordshire* Estate, is of considerable Amount, and is as yet unliquidated: But the same hath not as yet been laid out in a Purchase, pursuant to the said Will.

The QUESTION therefore referred for the Opinion of this Court upon the above Case and Facts, is "Whether the *Heirs of the Body of the Plaintiff Coningeby Harris* take any and what Estate under the said Testator's Will."

On Friday last, the 29th of January, Mr. *Jones*, on Behalf of the Plaintiff *Coningeby Harris*, argued that this was a good Executory Devise, within the Compass of Time allowed by Law.

The Time allowed by Law is a Life or Lives in being, or 21 Years after.

If the Testator meant it as an *immediate Devise*, and no Person was in being to take, it would go over to the Remainder-Man.

But from the Nature of this Devise, the Testator meant a *future executory Devise*. It is a Devise to *Coningeby Harris* "for 99 Years, if He shall so long live; and after his Death, "to the Heirs of the Body of *Coningeby Harris*."

Therefore a *future Executory Devise* passed by these Words; and no Estate immediately.

* See Abridgment of Cases in Equity, p. 189. pl. 14. & 15. and 1 Salk. 226 & material.

229, 230.
also 12
Mod. 52.

He disputed the general Distinction between Words *de praesenti*,* and Words *de futuro*. And he argued that it cannot take Effect as a *Contingent Remainder*; even though the Testator meant it so. But He did not mean it so. He meant it to be an *Executory Devise*; and the Law will give Effect to the Testator's legal Intention; The Manner how, is immaterial.

The Freehold descended to the Heir at Law; and shall be fetched back when the Contingency happens, 1 *Peere Wms.* 505. *Carter versus Barnardiston.* 1 *Levinz 11. Plunket versus Holmes.*

To shew that this was an *Executory Devise*, and not a *Contingent Remainder*, He cited *Gore versus Gore*, 2 *Peere Wms.* 28. and 65. and *Doe, on the Demise of Slator*, versus *Carlton*, in Ejectment in B. R. 28th June 1745—Devise to his Son *Henry Lee* for 99 Years; afterwards, to such Person as should be *Henry's Wife* at the Time of his Death, for 99 Years, if She should so long live; and after her Death, to the Heirs of the Body of his said Son *Henry* lawfully issuing, and the Heirs of their several Bodies. The Court held clearly "that " this Limitation to the Heirs of the Body of his Son *Henry* " was good as an *Executory Devise*."

† See 1
Salk. 226.
12 Mod. 52.
and Skinner
408. S. C.

As to the Cases of *Goodright versus Cornish* † and *Scatterwood versus Edge* ‡, they are too badly reported to be cited.

‡ 1 Salk.

Both abridg 229. and Mod. 278; but there called *Scattergood v. Edges.* See them ed, in the Abridgment of Equity Cases, p. 189. p. 14, 15.

Here, the Heirs of the Body must take *by Purchase*, if it be a good *Executory Devise*.

Mr. *Blackstone*, *contra*, for *Roger Elletson* (premising that this is an incorrect Question; for that *Coningesby Harris*, being now living, can have no Heirs of his Body;) endeavoured to distinguish this Case from that of *Gore versus Gore*; and likewise from the Case of *Doe, ex dim. Salter*, versus *Carlton*: Though He admitted the Principles of both these Cases. He agreed that the *Intention* of the Testator was "that the Heirs of the Body of *Coningesby Harris* should "take;" but denied that this Intention could take Effect by *Law*.

This Devise is—"To *Coningesby Harris* and the Heirs of "his Body," generally; not to his "first and every other "Son," as was the Case in *Gore versus Gore*. That Term was 500 Years. This is only 90. *Coningesby Harris* might, by Possibility,

Possibility, have outlived this Term. Here are Three Contingencies : In *Gore versus Gore*, there were *only Two*. The first Contingency in the present Case is *Coningesby Harris having Issue*; 2d, His dying during the Term: 3d, His Issue surviving Him.

Here, no Estate descended to the Heir at Law, in the mean Time, to support the Executory Devise: Which is necessary, to prevent the Freehold from being in Abeyance. This is the Foundation of Executory Devises: And One of the principal Questions in the Case of *Gore versus Gore* was * “ *In V. 1 Peere* “ *whom the Freehold vested at the Death of the Testator.* ” ^{29.}

Here is an *absolute immediate Devise of the Freehold to Roger Elletson*. It can not go back to the Heirs of the Devisor: For, it is a *complete Devise of All the Freehold to Roger Elletson*. It is not like the Devises of the Freehold in the Cases of *Gore versus Gore*, or *Doe, on the Demise of Salter, versus Carlton*.

There was no such express immediate Devise of the Freehold. But in the present Case, the Freehold immediately vested in *Roger Elletson* and the other Devisees.

The Distinction between devesting Estates, or not, depends upon the Estate's coming by *Purchase* or by *Descent*. *Lincoln College Case*, 3 Rep. 61. b. 1 Co. 95. *Shelley's Case*. And here, it being vested in *Roger Elletson* by *Purchase*, it can not go back.

Therefore this Case varies materially from the two Cases cited, and also from the Case of *Carter versus Barnardiston*: For, this is an *immediate Devise*, though subject to Charges.

Mr. Jones, in Reply, insisted, that this is an Executory Devise; (being within the allowed Compass of Time;) and that the Freehold vested in the Heir of Law of the Testator, in the mean Time, notwithstanding the Devise to *Roger Elletson*: For that the Devise to *Roger Elletson* was not meant to take Effect, till after the Failure of the Contingencies. After that Event, indeed, and subject to the Estates and Contingencies before-mentioned, the Testator gives Him the Remainder: But He meant Nothing at all for him, till after the former Estate given to the Heirs of the Body of *Coningesby Harris*.

LORD MANSFIELD — We'll think of it, and give our Certificate. We shall consider what the Testator meant, and the necessary Construction of his Words.

And

And now,

His Lordship communicated to Mr. Blackstone (publickly) the Certificate which They had settled : viz.

Having heard Counsel on both Sides, and considered this Case, We are of Opinion that the clear manifest Intent of the Testator was to give an Estate Tail to such Person as should be Heir of the Body of *Coningesby Harris at the Death of the said Coningesby*, (the only Determination of the 90 Years Term in the Testator's View,) "to Him and the Heirs of the Body of the said Coningesby;" with Remainders over, as in the Will: Which Intent of the Testator may by Law, take Effect as an *Executory Devise*; for, the Contingency must happen within the Compass of a Life in Being; and the Freehold, in the mean Time, (being undisposed of), descends to the Testator's Heir at Law.

And this, his Lordship said, would effectuate the whole Intention of the Testator.

See the Case of *Roberge de Mandevile*, Co. Litt. 26. b. and ante, Vol. 1. p. 50, 51. the Case of *Lancelot Hicks*, Devisee of *George Robinson*.

Thursday
4th Feb.
1768.

Rex versus Inhabitants of Wooton St. Lawrence.

See this Case at large, in the Quarto-Edition of my SETTLEMENT CASES, No. 187. Page 581.

Carter and Another, versus Murcot and Another.

THIS was an Action of Trespass for breaking and entering the Plaintiff's Close called *The River*, or *The River Severn*. The Defendant pleaded that it is a navigable River; and also, that it is an *Arm of the Sea*, wherein every Subject has a *Right to fish*. The Plaintiff (without traversing the Allegation) replied, that this was *Part of the Manor of Arlingham*; that Mrs. Yates was seised of that Manor:

Manor: And prescribes for a *several* Fishery there. Issue being joined thereon; a Verdict was found for the Plaintiff.

On Monday 9th November last, Mr. Aburft, on Behalf of the Defendant, moved in Arrest of Judgment, and had a Rule to shew Cause.

He objected that though the *Fact* was so found, yet the *Law* is otherwise; viz. that *every* One has a Right to fish in a *navigable River*, or in an *Arm of the Sea*. He cited 1 Mod. 105. Anonymous. 6 Mod. 73. Warren versus Matthews. 1 Salk. 357. S. C. and Ward versus Creswell, C. B. 14 & 15 G. 2, which recognizes 1 Mod. 105.

Mr. Serjeant Nares, for the Plaintiff, now shewed Cause.

It is *not* an Arm of the Sea where the Sea flows and re-flows; but a *Part of a Manor*.

It is found to be in the *Manor of Arlingham*, in the County of Gloucester. And a Place may be Parcel of a Manor, if between the High and Low Water Marks; though the Sea flows and reflows upon it. So is Sir Henry Constable's Case, 5 Co. 107. a. Bracton, lib. 2. c. 12.

Mr. Aburft, contra, for the Rule.

An exclusive Right cannot be maintained by the Subject, in a River that is an Arm of the Sea: The *general* Right of Fishing in an Arm of the Sea is common to all.

The Replication ought to have shewn that this was a separate Pool: But the Plaintiff can not maintain a *general* Right in the River, in Exclusion of all other the King's Subjects.

In Sir Henry Constable's Case—The Admiral had Jurisdiction between the High and the Low Water Mark. When the Tide is in, the Water can not belong to a Manor: And a Fishing can only be exercised when the Tide is in—when there is Water.

In Sir John Davys's Reports, p. 55—the Case of the Fishery in the River Parne in Ireland—it is said that the King has a Right as high as the Sea flows and reflows. And an Arm of the Sea, where the Tide flows and reflows, is the same as the Sea itself. Justinian Inst. lib. 1. c. 1. tit. 1.

6 Mod. 73. *Warren versus Matthews*—Every Subject, of common Right, may fish with lawful Nets &c, in a navigable River, as well as in the Sea; and the King's Grant can not bar them thereof. 1 *Salk.* 357. S. C. *Per Holt Chief Justice*—“The Subject has a Right to fish in all navigable Rivers, as He has to fish in the Sea.”

1 Mod. 105. *Anon.* In Case of a River that flows and re-flows, and is an Arm of the Sea; *Hale* says, “The Right of Fishing, is *prima facie common to All.*”

Lord MANSEFIELD—The Rule of Law is uniform.

In Rivers not navigable, the *Proprietors of the Land* have the Right of Fishery on their respective Sides: And it generally extends *ad Filum medium Aquæ*.

But in navigable Rivers, the *Proprietors of the Land* on each Side have it *not*; the *Fishery is common*: It is, *prima facie, in the King, and is public.*

If any One claims it *exclusively*, He must *shew a Right*. If He can shew a Right by *Prescription*, He may then exercise an exclusive Right: though the *Presumption is against Him*, unless He can *prove* such a prescriptive Right.

Here, it is claimed, *and found*. It is therefore consonant with all the Cases, “that He *may* have an exclusive Privilege of fishing, although it be an Arm of the Sea.” Such a Right shall not be *presumed*; but the Contrary, *prima facie*: but it is *capable of being proved*; and must have been so in the present Case.

Mr. Justice YATES—I was concerned in a Case of this Kind. Such a Claim was made: But the Claim failed, because it there happened that such a Right could *not* be proved: Therefore it was in that Case determined that the Right of Fishing was *common*. But such a Right *may* be proved. By the Law of England, what is otherwise *common may*, by Prescription, be appropriated. GROTIUS owns, that navigable Rivers *may* be appropriated.

The cited Cases prove only this Distinction, “That navigable Rivers or Arms of the Sea *belong to the CROWN*; and (like private Rivers) to the Land Owners on each Side:” And therefore the *Presumption lies the contrary Way* in the One Case, from what it does in the Other. Here, indeed, it lies, *prima facie*, on the Side of the *King and the Public*: But it *may* nevertheless be appropriated by Prescription.

The

The Case of the Royal Salmon-Fishery in the River *Banne*, in Sir *John Davys's* Reports, is agreeable to this: And 'tis a very good Case. It appears by it, that the Crown may grant a several Fishery in a navigable River, where the Sea flows and reflows, or in an Arm of the Sea: And in the Case of *Abbotsbury* there mentioned *—the Court said, “ it * P. 57. 2. must be intended that the Abby had originally had a grant from the Crown.” And in the Case in *Mod. 105*. *Hale* says truly—“ If any One will appropriate a Privilege to Himself, the *Proof lieth on his Side.*” Now if it may be granted, it may be prescribed for: A Prescription implies a Grant. But it can't be presumed: It must be proved.

Why then may not this Plaintiff prescribe for an exclusive Right of fishing in an Arm of the Sea, and PROVE this Appropriation, though the *prima facie Presumption* is contrary?

Mr. Justice ASTON concurred. This is the true Distinction: And *i Mod. 105* is in Point.

Per Cur' †.

RULE DISCHARGED.

[†] Mr. J.
Willes was
gone out of
Court.

Wellington *versus* Wellington.

Friday 5th
Feb. 1768.

THIS was a Case out of Chancery, upon the Will of *Richard Cary* late of *Walcott* in the County of *Oxford* Esq. wherein, after directing the Payment of his Debts and Funeral Expences, he proceeds thus.—“ Item, in DEFAULT of Issue of my own Body, I give devise and bequeath £c;” and so gives All his Estates in the several Counties of *Oxford*, *Southampton*, *Middlesex*, *Surry*, *Hereford*, and in the City of *London*, unto *John Arrowsmith* of *Chalberry* in the County of *Oxford* Clerk, and to *James Simmons* One of the Aldermen of *New Bondstock* in the County of *Oxford*, and their Heirs, IN TRUST to pay, out of the Rents Issues and Profits, unto his Sister *Elizabeth Wellington* on Annuity of 100*l.* per Annum, during such Time and until his just Debts Funeral Expences and Legacies (other than Annuities) should be fully paid and satisfied: and also an Annuity of 40*l.* per Annum to a Servant, *Sarah Vollier*. Then He gives another Annuity, and several Legacies. Then He wills that immediately from and after such Time as All his just Debts Funeral Expenses and the Legacies given by his Will (other than Annuities) shall be fully paid and satisfied by the said Trustees,

Trustees, from and out of the Rents and Profits of his said Estates, and subject to the two Annuities before given to the said Sarah Vollier and Jane Wellington, He gives and devises All his Estates to his Sister Elizabeth Wellington, for Life; Afterwards, to the said Trustees, to preserve Contingent Remainders; and after her Decease, to the Use of James Wellington, the second Son of his said Sister Elizabeth, for Life; then to the Use of the Trustees during his Life; and after his Death, to the Use of his first and other Sons in strict Settlement, in Tail-Male; and for Default of such Issue, then in like Manner, to the Use of Richard Cary Wellington, the Eldest Son of his said Sister Elizabeth; and in Default of such Issue, then, to All and Every other Son and Sons of his said Sister Elizabeth in Tail-Male; and for Default of such Issue, then, and in like Manner, to the Use of Jane Wellington the Daughter of his said Sister Elizabeth, in Tail-Male; And for Default of such Issue, then, to the Use of the first and every other Son of his Sister Jane late the Widow of Richard Wooley, and then the Wife of Thomas Collins, in Tail-Male. And lastly, He gives all his Estates to such Person as may be his Heir at Law; EXCEPT any Person or Persons as shall or may claim so to be, as being descended from his late Uncle Francis Henry Cary, Clerk. To these Bequests He annexes several Provisoes, Conditions, and Directions. And as to all the Rest and Residue of his Estate, He gives the same to his said Trustees John Arrowsmith and James Simmons, their Heirs Executors and Administrators, and likewise All his Copyhold Estates, to the same Uses; and appointed his said Sister Elizabeth Wellington Executrix.

The Testator, at the Time of making his said Will, and at the Time of his Death, was seised in Fee of the Premisses devised by Him to the said John Arrowsmith and James Simmons, in Default of Issue of his own Body; and died a Bachelor, leaving the said Elizabeth Wellington and Jane Collins Wife of Thomas Collins his Sisters and Coheirs. His said Trustees accepted the Trusts.

Upon these Facts, it was ordered by a Decree in Chancery, dated 9th Nov. 1767, in a Cause between the said Richard Cary Wellington et al'. Plaintiffs and Thomas Collins and the said Elizabeth Wellington et al'. Defendants, that the following Question be put for the Opinion of this Court of King's Bench—viz.

“ Whether the said John Arrowsmith and James Simmons, the Trustees in the said Will, took any, and what Estate under the said Will.”

Mr. *Blackstone*, on Behalf of the Plaintiff, argued that They took a *base* Fee, determinable upon the Payment of the Debts Legacies and Annuities.

The Objection was, that this Devise to them is an *executory Devise*, and *too remote* to take Effect by Law : It is not to take Place till after a *general Failure of Issue*.

Answer—The Default of Issue of his Body is only a *Condition precedent*. The Testator was a Bachelor: His Will was to take no Effect if He married, and had Children. The Words of it are—“ In *Default* of Issue of my own “ Body,” I give devise and bequeath &c.

If He had married and had Children, That would have amounted to a Revocation of this Will. To prove which, He cited 1 *Ld. Raym.* 441. *Lugg versus Lugg*, and 2 *Salk.* 592. S. C. One being single, made his Will, and devised All his personal Estate to *J. S.*: Afterwards He married and had several Children, and died without other Will or Disposition : And before the Delegates (of whom Lord Chief Justice *Treby* was One,) it was decreed, “ that there being such “ an Alteration in his Estate ; and Circumstances being so “ different at the Time of his Death, from what they were “ when He made the Will ; there was Room and presumptive Evidence to believe a Revocation, and that the Testator continued *not* of the same Mind.”

So, in 2 *Shower* 242. *Overbury versus Overbury*, it was adjudged, upon an Appeal to the Delegates, that if a Man makes his Will, and disposes of his personal Estate amongst his Relations ; “ and afterwards hath Children, and dies ; “ this is a *Revocation* of his Will, according to the Notion “ of the Civilians ; this being an *inofficium testamentum*.”

In 1 *Peere Wms.* 304. *Cook versus Oakley et al'*. a Case of *Eyre versus Eyre* is cited ; wherein it was holden “ that the “ total Alteration of the Testator’s Circumstances by marrying and having Children, was an implied Revocation of “ his Will.”

And in the Note at the Bottom of that Page, a Case of *Brown* against *Thompson* is mentioned, wherein Sir *John Trevor* held “ that a subsequent Marriage, and having Children, was a Revocation of a Will of Land.” And it appears in 1 *Eg. Cases Abr.* 413. that the Lord Keeper [Wright] was clear of Opinion “ that Alteration of Circumstances “ might be a Revocation of a Will of Lands, as well as of a “ *personal*

"*personal Estate*;" and allowed that the Statute of Frauds and Perjuries does not extend to an *implied Revocation*.

So far the Courts have gone in *implied Revocations*.

But here the Issue never existed. The Contingency never happened. The Issue which never existed could not be said to fail. He mentioned a Case of *Parsons versus Lane*, H. 7 G. 2. where the Words were, "in Case of his not returning from *Ireland*"—And Lord *Hardwicke* held it Conditional and Contingent.

This Devise being *Conditional*, the Court will support the Intention of the Testator.

This Expression, "in *Default of Issue of my own Fody*," differs from saying "on *Failure of Issue of my own Body*." The latter Expression supposes that Issue will exist: The former does not. It is consistent with the Event of their never existing, as of their dying in his Life-time.

This is not too remote for an *Executory Devise*: It was to take no Effect, if the Testator should have Children at his Death. He has only expressed what the Law would have implied.

2dly, But if it be not a *Conditional Devise*, yet it is not an *Executory Devise*; but an *immediate Devise*, to vest, (if it shall vest at all,) upon the *Death* of the Testator. In the Abridgment of Cases in Equity, p. 186. an *Executory Devise* is defined to be "a *future Interest*, which can not vest at the *Death of the Testator*; but depends upon some *Contingency*, which must happen before it can vest." Whereas this is a *present Interest* which *must vest at the Death of the Testator*, if at all.

The Case of *Walter versus Drew et al'* in C. B. Comyns 372. shews that the Estate to the Issue of the Testator must be an *Estate Tail*. That was a Devise that if *William*, the eldest Son of the Testator, should happen to die without Issue, then and not otherwise, after *William's Death*, he devised over to his Son *Richard* and his Heirs: It was holden "that *William* took an *Estate Tail*, by *Implication*." Therefore it can only give an *Estate Tail* to such Issue as might happen to be born between the Time of the Testator's making his Will, and his Death.

This Remainder to the Trustees is a *base Fee*, till Issue of the Testator's Body shall fail: And it would come into Possession

session on the Testator's Death. *1 Peere Wms.* 397. *Good-right versus Wright.*

3dly. If it should be considered as an *Executory Devise*— Still it must mean “such Issue as should be living at the Death of the Testator:” Therefore it would not be too remote, even upon the Foot of its being an Executory Devise.

The Testator certainly meant an immediate Estate to the Trustees; because He has directed them to pay Debts Legacies and Annuities. And their Estate took Effect immediately, by *Lapse*. *Vaugban 270. Gardner versus Sheldon.*

The Trustees, therefore, took some Estate by the Will:

The only Question is, “What Estate they took.”

It is given to them and their Heirs; and is to subsist, till the Debts Legacies and Annuities be paid.

Mr. Dunning, Solicitor General, contra, for the Defendants.

The Question turns upon the Construction of the Words, “*In Default of Issue of my own Body.*”

They mean an indefinite, a general Failure of Issue: Therefore the Executory Devise is too remote to take Place, in Point of Law.

In *Warburton's Case* in 1764, before Lord Northington— He was of Opinion “that the Devise to the Plaintiff being after a general Failure of Issue Male, was too remote, and void.” And that was (as this is) after Failure of the Testator's own Issue; and to those who were his Heirs at Law.

Though the present Testator was a Bachelor, and might think it probable that He should remain so; and therefore, in that Event, might mean his Sisters to take; yet the same Intention, for them to take, was as probable, in Case a different Event should happen; namely, that of his marrying and having Issue, and that Issue afterwards failing. Both Dispositions are equally reasonable and proper, and might (for aught that He knew to the Contrary) be equally legal.

The Testator might easily have expressed that limited Sense, if He had meant it: He might have added the Words “*Living at the Time of his Death.*” But He meant that All the Contingencies should take Place, according as the Events

"*personal Estate*;" and allowed that the Statute of Frauds and Perjuries does not extend to an *implied Revocation*.

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Though the present Testator was a Bachelor, and might think it probable that He should remain so; and therefore, in that Event, might mean his Sisters to take; yet the same Intention, for them to take, was as probable, in Case a different Event should happen; namely, that of his marrying and having Issue, and that Issue afterwards failing. Both Dispositions are equally reasonable and proper, and might (for aught that He knew to the Contrary) be equally legal.

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should happen; and had no Intention of confining the general Failure of Issue of his Body, to the particular Time of his own Death.

These can not be considered as *Remainders*: It is an *Executory Devise*, intended to take Place *in futuro*.

The Notion is quite new, “that an Estate Tail by Implication can arise in the Testator’s Issue:” The Words can not support such an Idea of the Testator’s Meaning.

Nor did the Testator mean to give his Trustees a *base Fee*. He only meant to give them an Estate *on FAILURE of his own Issue*, whenever they should become extinct: Then, and *not till* then, his Sisters were to take. But that is a Period too remote for supporting it as an *Executory Devise*. It can not take Place as a *contingent Remainder* upon the Testator’s Children taking an Estate Tail by Implication: For there is no Estate to support such a contingent Remainder.

There is no Reason to suppose that the Testator meant these Words in a more restrained Sense than their Ordinary usual Sense. There is no Foundation to support this Devise as an *immediate Devise*; and much less, as a *contingent Remainder*.

“*In DEFAULT of my own Issue*” means, that whether his Issue should fail by his never having had any, or by their becoming extinct, it should in either Case go to his Sisters.

Lord MANSFIELD observed, that this is only a *double Contingency*: Of which, One Part is *good*, by Law; the Other, bad.

Mr. Blackstone, in Reply—The Testator’s provisional Disposition is an *abundans Cautela*.

This Case is singular, as being in Default of Issue of the Testator’s own Body.

Warburton’s Case was not a Determination on Contest and Argument. It was a Bill to prove the Will *per Testes*: And the Devisee was Heir at Law of the Testator.

The Court will go as far as They can, to support the Intention of the Testator.

I did not mean that the Testator meant an Estate Tail to *Himself*: I meant that if He should happen to have Issue born after making the Will, it might be an Estate Tail in *them*.

I principally rely on its being only a *Conditional Devise*.

Lord MANSFIELD—When a Devise must take Effect at the Death of the Testator, it is not properly an *Executory Devise*. Such a Devise is a Devise upon a Contingent Event which must happen at or before the Death of the Testator. As *Executory Devise* is a Devise that is to take Place *in futuro*.

As to an *implied Revocation*, from Alteration of Circumstances; it is now settled—"that as to *personal Estates*, "Marriage and having a Child is a Revocation;" But no Case has yet holden Marriage alone to be a Revocation.

I see no Ground of Argument why the Law should not be the same, as to Devises of *Land*: The Reason is the same. In *Meggot versus Meggot*, Lord Hardwicke directed an Issue, merely to try this Question: But the Cause was made up by the Family, and never tried. *

* Note—It
has since
been ad-

judged in the Court of Exchequer, by the Opinions of Sir Thomas Parker, then Lord Chief Baron, Mr. Baron Smythe, and Mr. Baron Adams, against Mr. Baron Perrott; and also at the Cockpit, Sir Eardley Wilmot and Lord Chief Justice De Grey concurring, "that Marriage and a Child was a Revocation of a Devise of *Land*."

WE will think upon it; and give our Certificate.

The CERTIFICATE was as follows—"Having heard "Counsel on Both Sides, and considered this Case, WE are "of Opinion That *John Arrowsmith* and *James Simmons* "took a FEE, determinable when the Purpose of paying the "Testator's Debts Legacies and Funeral Expences, out of "the Rents Issues and Profits of the devised Premisses, in "Aid of the personal Estate, shall be performed."

It was dated 11th February 1768.

Rex *versus* Lambe, Esq;

ON Tuesday 10th November, in Michaelmas Term last, a Motion was made for a New Trial; and a Rule granted to shew Causē why the Verdict should not be set aside, and a New Trial had.

The Cause was tried in the County Palatine of Durham; and related to the Rights of a Corporation of Durham. On the last Day of that Term, Mr. Justice ASTON reported the

Evidence, from Mr. Baron Perrott who tried the Cause. But it is not necessary to meddle with that at present: For, though some Objections were then made to the Proof of Facts, and that the Evidence was not sufficient to support the Verdict, yet the principal Objection taken on Behalf of the Defendant, was, "that the *Warrant for a Tales de Circumstan-*" "tibus," (for there were not enough of the *Special Jury*) "ought to have been a Warrant from the Attorney General" "of the *County Palatine*:" Whereas the Prosecutors had only procured a Warrant from His Majesty's *Attorney General*.

It was now argued by Mr. Wallace and Mr. Wingfield, for the Prosecutors; and Sir Fletcher Norton, Mr. Wedderburne and Mr. Davenport for the Defendant.

As to the Trial by a *Tales*, without any Warrant from the Attorney General of the *County Palatine*—The Answer was, that it fell within the *Equity* of the Stat. of 5 Eliz. c. 25. § 2. which enacts, "that in *Wales* and in the Counties Palatine of 'Chester Durham and Lancaster, where a full Jury shall not appear, the Justices may, upon Request by the Plaintiff or Demandant, command the Sheriff to name so many other Persons present, as shall make up a full Jury: which shall be added to the former Pannel."

The substantial Intention of the Act was, that in *all* Causes where Issue is joined in the Courts in *Westminster-Hall*, the Judge who tried the Cause should grant a *Tales*: And there is no Exception of the Counties Palatine.

But it is objected, "That the Request was not made by any Person authorized to make it on the Part of the Crown: For, that it was made by the Attorney General of the King, and not by the *Bishop's* Attorney General."

Mr. Wallace said He remembered an Objection directly the *Reverse* of this: And the Judge refused to try the Cause, because the King's Attorney General had not signed a *Warrant for a Tales*, though the *Bishop's* Attorney General had. And the following Year, a Cause was tried upon a *Warrant* signed by the King's Attorney General only; though the *Bishop's* Attorney General was present in court.

The Counsel for the Defendant argued That the *Tales* was not regular in itself, nor regularly applied for; and that it could not be annexed to this *Jury-Process*, which is only a *Venire facias* (without an *Habeas Corpora*)

The

The old *Tales* at Common Law remains, in all Cases not described in 35 H. 8. c. 6. which gives the *Tales circumstantibus* in certain particular Cases only; of which, this is not one.

They said, It does not extend to Trials at Bar, nor to Justices of Assize, nor to Counties Palatine, nor to Criminal Cases: It only extends to civil Suits, and where Issue is joined at Westminster. And they cited *Alfridus Denbarw's Case*, 10 Co. 102. The Statute of 4 & 5 P. & M. c. 7. extends it to criminal Causes where Issues are joined at Westminster. Then 5 Eliz. c. 25. extends it to the Counties Palatine as to civil Suits; but not to criminal Suits. Therefore the Counties Palatine still remain as at Common Law: and as Trials at Bar still stand: And no Equity can extend this Statute to them, as to criminal Suits.

But if a *Tales* had been allowable in this Case, the Warrant ought to have been signed by the *Attorney General of the County Palatine*—Though all Writs run in the Name of the Crown, yet the Bishop names all the Judges and Officers: And they have the same Authority there, as other Judges and Officers have in other Counties. Causes go down to Trial here, by *Mittimus*: But the Record is not sent with it, nor is any Jury-Process sent with it. All that is done in the County Palatine: And the Bishop's Attorney General does every Thing there, that the King's Officers do in the County at large.

This Trial is upon a *Venire facias*: And the *Tales* is annexed to the *Venire facias*. But 2 Lord Raym. 1163. per Holt—“A *Tales de Circumstantibus* can not be granted upon “the *Venire facias*.”

As to the two Cases cited by Mr. Wallace—One of them was, “that Both Attorney Generals together could not give “a Warrant for a *Tales*.” But that was a single Case; and many were dissatisfied with it. The Attorney General of the Bishop does, in fact, exercise this Authority: And this is a Mis-trial for Want of his Warrant.

Lord MANSFIELD—As to the *Tales*—At present I think that, as this is an *Issue joined at Westminster*, and the King's Officer prosecutes it, the Warrant for the *Tales* must follow that; and the King's Attorney is to sign it.

Mr. Justice YATES concurred: And that there was no Need of the Aid of the Statute of 5 Eliz. c. 25. to impower the granting a *Tales de Circumstantibus* in the Counties Palatine. The Judges of the Counties Palatine have the same Authority as the King's Judges of *Nisi prius*: And the *Poista* is to be returned in the same Manner as from other Judges of *Nisi prius*.

As to Trials at Bar—The Reason is very different; There is a proper Method of proceeding to try it by a *Tales*; namely, a Writ of *Decem Tales*; which can not be on Trials at *Nisi prius*.

As to the *Bishop's* Attorney General—He shall not have Power to contradict the King's Attorney General, and to say “it shall not be tried: Which might be the Case, if He was to grant the Warrant, instead of the King's Attorney General.

Mr. Justice ASTON and Mr. Justice WILLES were of the same Opinion.

Per Cur.

RULE DISCHAGED.

Saturd. 6th Hague and Others, Assignees of Anne and Isaac Feb. 1768. Scott, Bankrupts, *versus* Rolleston.

THIS was a Motion for a new Trial, in an Action of Trover brought to recover the Value of seven Bags of Cochineal.

It had been tried before Lord Mansfield at Guildhall; and a Verdict found for the Plaintiffs: But a Point of Law arose on the following Facts.

Anne and Isaac Scott were Merchants and Copartners. On the 27th of March 1767, Isaac went out, with Intent to abscond; and did not return till after a Commission of Bankruptcy had issued against him. On the 30th the Defendant received a Letter written by Isaac Scott, dated “Dover 28 March,” inclosing a Bill of Parcels, dated 23d March, of seven Bags of Cochineal, for 1645l. 14s. 6d. as if the Defendant had purchased the same of the said Anne and Isaac Scott; and informing the Defendant that He (Isaac Scott) “was gone off,” and “that He had deposited the seven Bags of Cochineal at George Street's Warehouse, in Rolleston's Name and for his Use;” though, in Fact, He had not purchased or agreed to purchase any such Goods of them: But the Defendant imagined, it was intended to secure him in Part of the Debt due from the Partnership. On the 30th of March, the Defendant went to the Warehouse of George Street in Thomas-street, which was a public Warehouse; where He found the seven Bags of Cochineal deposited there in his Name; Which He sold and disposed of, and applied the Money to his own Use in Part of Payment of the Debt due from

from them to him. They had been deposited there with Street, on the 26th of March, for the Defendant Rolleston. On the 25th Isaac Scott told Street, "that they were for the Defendant :" And they were so booked at the Warehouse. But though the Goods were sent to the Warehouse before Isaac Scott's Act of Bankruptcy, (*viz.* his absconding and not returning;) yet the Defendant did not then know that they were there: And He did not declare his Acceptance of them, till after that Time.

The Plaintiffs were Assignees in a joint Commission which afterwards, on the 12th of April, issued against Both the Scotts Anne and Isaac.

Sir Fletcher Norton and Mr. Dunning, Solicitor General, insisted that the Defendant was intitled to retain the *Moiety* belonging to that Partner who did not become Bankrupt till after Rolleston had declared his Acceptance of the Cochineal: though there was afterwards, a joint Commission against Both.

This Act of Isaac bound both Partners. His subsequent Bankruptcy could only affect his own Share in the Partnership Estate: It could not affect the Mother's. Rolleston stands in the Place of the Mother: And before her Bankruptcy, He was joint Partner with the Assignees of Isaac in this Cochineal; and had an UNDIVIDED *Moiety* in it.

Besides, a Trader may prefer one Creditor to Another, before any Act of Bankruptcy. And here is no Fraud or Collusion in the Defendant. Consequently, the joint Assignees against Mother and Son can not maintain this Action of Trover against Rolleston for the *Whole* of these Goods.

Mr. Morton and Mr. Wallace, contra, for the Assignees under the joint Commission.

The Mother's Moiety was bound by Isaac's Bankruptcy. All the joint Effects are bound by the Bankruptcy of either Partner. The Messenger under the joint Commission of Bankruptcy might have seized the *Whole*, if they had remained in their Warehouse.

Such a Delivery as this was, under a private order of Isaac, unknown to Rolleston, and unknown to Anne Scott, was no Sale to Rolleston. The Goods were not appropriated to him, till after Isaac Scott's Bankruptcy: And after his Bankruptcy, He had no Right to sell. He could not, after that, bind the Partnership Effects. Rolleston took the Goods UNDER the Bill of Parcels which was sent by Isaac from Dover; at which Time He was a Bankrupt; And consequently, Anne Scott's

Scott's Share was liable to be seized under the Commission against Isaac.

On the other Side, it was urged in Reply, that *Isaac Scott had, at the Time of the Act done, a Right to dispose of the Goods : His Act was the Act of both Isaac and Anne. His subsequent Bankruptcy only rescinded his Interest, but leaves Anne's Interest in Rolleston. The Assignees of Isaac, and She, were Tenants in Common of the Goods. The Court must consider it as if Anne had never become a Bankrupt : For Rolleston stood in her Place. The Act of Isaac, when both Partners were solvent, was the Act of both Partners, and bound Anne's Share as well as Isaac's. Therefore her subsequent Bankruptcy signifies Nothing : For her Assignees can only stand in her Place. Street's Warehouse was a public Warehouse. And as soon as Rolleston signified his Assent to the Contract, it was perfected. Indeed Isaac's Share was gone, by his prior Bankruptcy : But as to Anne's Share; the Contract was perfected, and Anne's Share was bound by it : And on the 30th of March (which was prior to Anne's Bankruptcy) Rolleston was intitled to her Share.*

Lord MANSFIELD—Under a joint Commission, the Commissioners assign the Effects of Both. On an Application *ex parte Turner*, in March 1742, it was holden, that the joint Commission carries All the Effects, both joint and several *.

* In 1 At-
kyns 97. the
forty-fifth

Cafe is *ex parte Turner*: But the Date of it is August the 14th 1742. "That where there is a joint and separate Commission, a Creditor under the joint may come under the separate, and assent or dissent to the Certificate under the separate."

Consider, here, the Effect of booking the Cochineal on 26th March, in the Name of *Rolleston*; and whether it does not go to the Whole. And the subsequent Assent, if it does any Thing, must go to the Whole. The Assent could not be good for Part; and not good for the other Part.

But the Assent was to Nothing at all. The Deposit was not completed antecedent to the 30th of March. I was clear at the Trial, that this Assent could not be good for the Whole; because there was Nothing to assent to: Nor did *Rolleston* in Fact assent to any Thing but the false Bill of Sale sent to him from *Dover*. And that Bill of Sale was after the Act of Bankruptcy committed by *Isaac Scott*. Therefore He could not then affect the Partnership; which was at an End, by the Bankruptcy. And *Rolleston's Assent was to this false Bill of Sale, sent to him to make him a Creditor upon a false Foundation of a Dealing upon Speculation.*

Mr.

Mr. Justice YATES—*Isaac's Contract must bind the Whole, or not operate at all:* It could not be good for one Part, and not for the Other. His Act was *not complete* upon the 26th March: It was *revocable till Rolleston's Assent*: and He must assent to the *whole Contract*, if He assented at all. All *Isaac's Power was gone*, when He wrote from Dover. His Act of Bankruptcy dissolved the Partnership.

The Assignees of *Isaac* could never be said to be Partners with *Anne* the other Partner. The Transaction is void, and seems a Fraud: There is no Account stated; a voluntary Deposit is made, to favour *Rolleston*. Therefore *Isaac's A&t* was void, and had no Effect on the Moiety belonging to *Anne*.

Mr. Justice ASTON and Mr. Justice WILLES were of the same Opinion.

Per Cur'.

RULE (to shew Cause why the Verdict should not be set aside, and why there should not be a New Trial,)

DISCHARGED.

See more on this Subject, in the Case of *Harman and Others, versus Fisher*, determined on 14th June 1774; upon the Preference attempted to be given by Mr. *Fordyce* to Mr. *Fisher*, One of his Creditors.

Thompson *versus Hervey*, Esq.

ON shewing Cause against a motion for a New Trial, in an Action brought against the Honourable Mr. *Thomas Hervey*, (second Son of the late Earl of *Bristol*, and Uncle to the present Earl,) for Lodging and Necessaries for his Wife, during her Residence at *Bristol*, (which her Health absolutely required;) wherein a Verdict had been given for the Plaintiff, against Mr. *Hervey*; It appeared from Lord *Mansfield's Report*, who tried the Cause, and repeated the Evidence, that She had herself paid Part of the Money, *viz.* what was due to the Plaintiff for the former Part of the Time; and that She had a Pension, *during Pleasure*, from the Crown, determinable at the Will of the Crown, of 300. a Year, granted to Her in her *own NAME*, but *not by any Agreement or otherwise appropriated* at all to her *own USE*. That at her Return from *Bristol*, her Husband shut his Doors against Her.

Her. That Mr. Hervey had never made or agreed to make any separate Allowance to Her, or had contributed any Thing towards her Support, since He had so shut his Doors against Her ; nor had She any Use of his Table, Servants, or Equipege. And there was Evidence given of his being reputed to have an Income of about 1800*l.* per Annum.

THE COURT were extremely clear, that her Husband (Mr. Hervey) was liable to this Action ; and that the Verdict obtained against Him ought not to be set aside.

Here is no Agreement for a Separation : But He has sent Her adrift, by shutting his Doors against Her. He allows Her no separate Maintenance, nor any Support at all. And there is no Pretence of this Lodging and other Support provided for Her by the Plaintiff, being improper for her Degree and Condition of Life. And as She had no Maintenance from her Husband, nor Admittance into his House, She was obliged to procure Lodging and Maintenance somewhere else. Every Man is obliged to maintain his Wife.

The Pension is only a voluntary Grace and Bounty of the Crown, and only during the Pleasure of the Crown ; not what any Creditor of Her's, even for her necessary Subsistence suitable to her Degree and Rank of Life, can be supposed to give her Credit upon.

Per Cur. unanimously—

RULE DISCHARGED.

See the Case of *Manby versus Scott*, in *1 Siderfin* 109.
1 Lew. 4. *1 Mod. 124.* and other Books. See also
1 Lord Raym. 444. *Todd versus Stokes*, and the Case
of *Longworthy versus Hockmore*, there cited.

Monday 8th
Feb. 1768.

Rex *versus* Inhabitants of Great Bedwin.

See this *Case at large*, in the Quarto-Edition of my SETTLEMENT-CASES, No. 188. Page 584. and abridged in the Table of that Book.

Rex

Rex *versus* Lord Baltimore,

Friday 12th
Feb. 1768.

Rex *versus* Anne Darby;

Rex *versus* Elizabeth Grieffenburgh.

THE Two Women were brought up by *Habeas Corpus*; and appeared (upon the Return) to be committed for being *assisting aiding and abetting* to Lord Baltimore in *feloniously ravishing and carnally knowing Sarah Woodcock*. Spinsters. They were committed as being charged upon the Oath of the said *Sarah Woodcock*, for being feloniously assisting aiding and abetting Him in feloniously ravishing and carnally knowing Her against her Will and Consent, against the Form of the Statute. But they were not charged, either by the Oath or Warrant of Commitment, with being *present*: And therefore they were agreed to be only Accessary before the Fact.

The Counsel for the Prosecutrix, declaring "that the Prosecution was carried on merely for the Sake of public Justice, and that They had no other Wish than to obtain it;" declined either to consent to or oppose Lord Baltimore's being bailed; but left it entirely to the Discretion of the Court, to act as They should think proper; as their sole Point in View was that his Lordship should be, at all Events, amenable to Justice.

Lord MANSFIELD approved of their Conduct. At the same Time, He observed that Lord Baltimore's voluntary Surrender was a strong Indication that He had no Intention of absconding from Justice: The Probability whereof was greatly heightened by the large Property which He was known to possess; of which He would incur a Forfeiture by running away.

Therefore—Let him be bailed by four Manucaptors, in 1000*l.* a-piece; and Himself, in 4000*l.*

And let the two Women be bound in 400*l.* Each; and their Securities (All of them together) in the like Sum.

Accordingly—Lord Baltimore entered into a Recognizance in 4000*l.* and four Manucaptors, in 1000*l.* a-piece.

Anne

Anne Harvey (committed by the Name of *Darby*) in 400*l.* and her four Bail in 100*l.* Each.

And *Elizabeth Grieffenburg's* four Manucaptors (She being a married Woman) in 200*l.* a-piece.

The Condition of the Recognizances was " to appear at
" the next Assizes and General Gaol-Delivery for the
" County of *Surrey*."

Sulyard *versus* Harris.

THIS Case was a Point of *Practice*, about delivering a Declaration by the By.

It was a Suit by Bill, against *Harris*, by Two Persons, named *Sulyard*. *Harris* was served with a common Process, not requiring Special Bail. He appeared at the Return of the Process, and filed Common Bail. The next Day, *Edward Sulyard alone*, One of the two Plaintiffs, without his Companion, delivered a Declaration by the By, against the Defendant. And the Defendant obtained Mr. Justice *Yates's* Order to stay Proceedings.

Sir *Fletcher Norton* argued on Behalf of the Defendant. He said, All Process must be served. Now here is no Service of Process at the Suit of *Edward Sulyard alone*.

If the Appearance had been entered by the Plaintiff's Attorney, under the Statute, it had related only to Plaintiff and Defendant in that Suit.

Here the Defendant appeared, *Himself*: And He shall not be in a worse Case, for doing so. Yet He would be so, if all Mankind might deliver a Declaration against Him.

There is a great Difference between being in *actual* Custody of the Marshal; and what is only *legal* Custody. In the latter Case, None but that same Plaintiff can declare against Him.

In the Case of *Reeks et Ux. versus Robins, Trin. 10 G. 2. C. B. 1 Barnes 245.* in 1st Edition; 337. in 4to Edition; it was held " that a Plaintiff can not declare by the By, joined with his Wife or any other Person :" And the Proceedings

ceedings on the Declaration by the By were stayed ; there being no Process to warrant it.

The Rule of this Court, *M. 10 G. 2. 1736.* is, that where the Plaintiff files Common Bail for the Defendant, pursuant to the Act of 12 G. 1. c. 29. § 1. the Defendant is *not* in Court, as to any other Person's Suit, but only that of the Plaintiff who has so filed Common Bail for him.

Here, the Defendant is a *Volunteer* in appearing : There, He is forced into Court.

When He comes voluntarily into Court, He can not have a Declaration by the By filed against him by a *Stranger*. And here, the Plaintiff is a Stranger to the first Suit.

Mr. Barnes, contra—The Note of the Case cited on the other Side is in Point for Us. It was allowed to be the Practice of the Court, “ that the Plaintiff may, the same Term “ the Process is returnable, declare against the Defendant “ as often as He would, at his own Suit.” And that is the present Case. Here, the Plaintiff is *not* a Stranger to the Process ; but One of the two Persons who brought the *Latitat*.

By *Lilly's Practical Register* 409 & 413. “ If One be in “ the Custody of the Marshal, any One may deliver a De-“ claratio[n] against Him *de bene esse*.”

Lord MANSFIELD—I consider the Plaintiff as a *Stranger*, in the same Light that *Sir Fletcher Norton* has stated Him : But the Defendant was in Court, by having filed Bail in the former Action.

Mr. Justice YATES—The Custody of the Marshal is the Foundation of this Court's Jurisdiction : When a Defendant is in Custody of the Marshal, He is then present in Court. But this Man was not in *actual* Custody of the Marshal.

The *MASTER* (*Mr. Owens*) reported the Practice to be “ That where the Proceeding is by *Bill*, if a Defendant “ is in Court, either by being in *actual* Custody of the Mar-“ shal, or by a *voluntary Appearance* at any Plaintiff's Suit, “ any Other Plaintiff is at Liberty to deliver a Declaration “ by the By against Him, *within* the same Term wherein the “ Writ was returnable.”

Lord

Lord MANSFIELD asked if the other Officers of the Court were of the same Opinion: And on their confirming it by their Own—

Per Cur.

The RULE was made ABSOLUTE, for discharging the Judge's Order.

The End of Hilary Term 1768, 8 G. 3.

ADDENDUM TO THIS TERM.

NOTE.—The Name of the Case mentioned to be adjudged in the Exchequer (*ante*, p. 2171.) was *Christopher* against *Christopher and Others*, upon the Will of *Daniel Christopher*; who had made a Will in the Time of a former Wife, who died without Issue; and he married a Second Wife, by whom he had Issue, the Plaintiff in the Exchequer. The Decree was made on *Saturday 6th July 1771*. The Court declare therein, “ That the Testator’s second Marriage, and having “ Issue by that Marriage, is a total Revocation of the afore- “ said Will made by the said *Daniel Christopher* in 1757;” and thereupon order adjudge and decree “ that the said Plaintiff is well intitled to the said several Real Estates the said “ *Daniel Christopher* died seised of.”

Easter

Easter Term

8 Geo. 3. B. R. 1768.

TH E late MARSHAL having died in the Vacation, a Wednesday new One was, this Day, sworn in; who was appointed by the Crown, pursuant to the Statute of 1768.

27 G. 2. c. 17. made "for revesting in the Crown the Power of Appointing the Marshal of the Marshalsea of the Court of King's Bench; and for the better Regulation of that Office, and of the inferior Offices thereunto belonging; and for rebuilding the King's Bench Prison."

BEFORE this Time, the Appointment had been in *private* Persons. See the Preamble of this Statute; which recites a Grant of King James the First to a private Gentleman his Heirs and Assigns, and all the mesne Conveyances and Mortgages of this Office: After Payment of a Composition for which Mortgage-Monies and Interest, the Act * *revests in the Crown* the Site of the Prison and the Power of granting the Custody of it, and the Office of Marshal; to remain for ever thereafter unalienable.

Mr. *Afton*, who had been sworn in upon the 21st of May 1747, on the Death of Mr. *Richard Mullens*, was thereby continued in his Office †.

* Sect. 2.
† Sect. 3.

On whose Decease, the King now appointed *Benjamin Thomas*, Esq, to succeed him.

This Appointment was by *Sign Manual*, countersigned by Lord *Weymouth*, Secretary of State: Which recited the Vacancy of the Office, by the Death of Mr. *Afton*; and that by the Act of 27 G. 2. it is in the Nomination and Appointment of the Crown, by Letters Patent or *Sign-Manual*; and the Importance of it to the Suitors and Prisoners; and that Lord *MANSFIELD*, Lord Chief Justice of the King's Bench had recommended

recommended Mr. Thomas, as a Person fit and every Way qualified to execute it. Whereupon the King nominates constitutes and appoints Him to be Marshal of the Marshalsea of this Court; and grants to Him the said Office, and all Fees Perquisites Profits Powers Privileges and Advantages thereto belonging, together with the Custody of the said Prison and the Prisoners thereto committed; To have exercise and enjoy, *so long as he shall behave well in it*, and shall be resident in the said Prison or within the Rules thereof. Dated at St. James's, 23d March 1768, Anno Regni octavo.

Note—The fifth Section is express, “ that the Grantee shall have hold and enjoy for and during so long Time as He shall behave himself well in his Office, and shall be resident in the said Prison or within the Rules thereof, *and no longer*: And all Grants of the said Office shall be made accordingly; or, otherwise, shall be void.”

Mr. Thomas had before been sworn in at Lord MANSFIELD'S Houle, upon the 25th of March.

He took the Oath of Office on his Knees, both then and now.

The Oath of Office was as follows—

“ You shall swear, that during the Time that you shall exercise the Office of Marshal of the Marshalsea of our Sovereign Lord the King, of this Court, you shall well and truly, in all Respects, to the uttermost of your Power and Knowledge, use exercise and behave yourself in the same Office; you shall increase no Fees, but shall content yourself with the ancient Fees of the Court belonging to your Office; and in all Things that do or shall appertain to the Duty of your Place, in Execution of your said Office, you shall truly and honestly demean yourself.

“ So help you GOD.”

Saturday
23d April
1768.

Rex *versus* Inhabitants of Gainsborough.

See this Case at large, and also abridged, in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 189. Page 586.

Ex Parte Prisoners in the Custody of the Marshal.

THE Prisoners who had given Security to the * late * v. ante, Marshal, applied by Petition for the Directions of the p. 1289. Court with Regard to their giving *fresh* Security.

Per Cur'—Let the Petitioners be at Liberty to give a new Security to the present Marshal.

Mr. Solicitor General took this Opportunity of mentioning, "that the Security given by the TIPSTAVES was too little." It is only 300*l.* Each: Whereas they may happen to have the Custody of Prisoners charged with 10000*l.* and they are, by 27 G. 2. c. 17. *scz.* 10. to give such Security as the Court shall direct.

But THE COURT observed that the Tipstaves held their Places, at present, for their *Lives* (though liable indeed to Amotion upon Misbehaviour) and had *purchased* them before the making of this Act: And therefore it would be too hard upon the *present Possessors* of these offices, to require a greater Security than had been usual.

THE COURT, at the same Time, made the general Order always, or at least usually, made upon the Appointment of a new Marshal.

Mr. Owens, Secondary of the King's Bench Office, read some old Rules of this Kind: *viz.* One in 4 Jac. 2. on the Succession of Philpot; and another in H. 11 G. 1. The former run—"Qd' capiat in Custo-
" diam suam omnes Prisonar' qui sunt ad largum
" extra Prisonam;" And, 'Qd' capiat in Custod'
" suam omnes Prisonar' qui sunt in Regulis :" The latter—"Qd' recipiat omnes Prisonar' qui fece-
" runt Escap' à Prison' Mar' et non legitimè exone-
" rentur è Prison, pred'; et ducat eos in Prisonam
" predict'."

Lord MANSFIELD ordered a like Rule to be drawn up now: Which, on Deliberation, was thus settled— It is ordered that Benjamin Thomas, Esq. the present Marshal of the Marshalsea of this Court do take into his Custody All the Prisoners who are at large without the Walls of the Prison of the said Court; and also All Prisoners who have escaped and are not law-

fully discharged out of the said Prison ; and bring them into the Prison aforesaid.

On the Motion of Mr. SOLICITOR GENERAL:

Wednesday
27th April
1768. **Rex versus Doctor Askew et Al'. Censors of the College of Physicians.**

IT would require a VOLUME, to give a full and particular Detail of this long Contest between the Fellows and the Licentiates ; which was litigated with great Spirit and Eagerness between several very learned and respectable Gentlemen of the Faculty, on both Sides. It must not therefore be attempted, within the Compass of a Collection, already perhaps too faulty in this Respect : as being, in many Instances, more minute and circumstantial than may appear absolutely necessary, or at all agreeable to some Readers.

The Substance of it, however, ought not to be omitted : Which was as follows.

A Rule had been obtained, upon the Application of Dr. Letch, for the College of Physicians to shew Cause why a Mandamus should not issue, directed to them, commanding them to admit JOHN LETCH Doctor of Physic, to be a Member of the College.

This Rule was made upon the whole Body of the College or Community of the Faculty of Physic of the City of London ; and also upon the President and Censors of the said College.

On Thursday 7th May 1767, Mr. Yorke shewed Cause against this Rule ; and Sir Fletcher Norton argued in Support of it.

The short State of the material Facts, with Respect to this Mandamus, was—That Dr. Letch, who practised as a Man-Midwife, was summoned by the College, to be examined. He therefore came in ; and was examined thrice at the *Comitia minora* : And after the third of those Examinations, he was there ballotted for, “ Whether he should be *approved* “ *of by them, or not,*” A Dispute arose upon this Ballot. The Majority of the Number of Balls *appeared* to be for approving him : But One of the Censors declared “ that he “ had by Mistake, put in his Ball FOR Approbation ; which “ he meant and intended to be AGAINST approving him.” It was proposed “ to ballot over again.” But the President considered and declared this to be an Approbation by a Majority

rity of Votes on the Ballot. On Dr. Letch's being proposed to the *Comitia Majora*, nineteen to three of the Members present were *against* putting the College-Seal to his Letters testimonial: And he was informed "that he was NOT elected."

His Counsel insisted, that having been returned sufficient by the *Comitia minorata*, he had thereby acquired an inchoate Right to Admission; which the Court would enforce the Completion of, by Mandamus.

In this Argument, the Charter of the College appeared to bear Date on 23d September 10 H. 8. (1518.) And the following Statutes were mentioned; 3 H. 8. c. 11. and 14 & 15 H. 8. c. 5. And some By-Laws or Statutes of the College: Particularly, Caput octavum, "*de Comitiis majoribus*," and Caput decimum quartum. The former says—" *Comitia vocamus Congregationes illas licitas et honestas, quas ut Præsidens et Collegium sive Communitas et eorum Successores de Seipsis habeant, Rex Henricus concessit. Ordinaria autem sive statu Comitia, Majora dicenda, quater Anno celebrentur, &c. In Comitiis majoribus hiant ELECTIONES et AdMISSIONES Sociorum, Candidatorum et Permissorum. Quod verò ad Candidatorum et Permissorum Examinationes attinet, Eæ fieri possint vel in Majoribus Comitiis, vel in Minoribus et Censoriis, pro Arbitrio Præsidentis aut Propräsidentis et Censorum, aut eorum Partis majoris.*" The Caput decimum quartum (*de Examinationum et Admissionum forma*) enacts—" *ANTEquam quispiam aut in Candidatorum ordinem, aut ad Medicinæ Facultatem in Urbe Londino et per septem Millaria in Circitu ejusdem exercendam admittendus præponatur, examinetur in tribus Comitiis, sive Majoribus sive Minoribus, pro Arbitrio Præsidentis aut Propräsidentis et Censorum, aut eorum majoris Partis, &c. Omnes hæ Examinationes fieri possunt in Comitiis minoribus sive Censoriis, à Præsidente aut Propräsidente, et quatuor Censoribus; aut (uno ex Censoribus absente) à Præsidente aut Propräsidente, tribus Censoribus, et absentis Censoris Vicario. Liceat tamen cuilibet Socio, pro arbitrio, disputare et periculum facere quantum Examinandus in Re Medicâ valeat. Qui ad hunc Modum examinatus, et à Præsidente aut Propräsidente et Censoribus aut eorum majori Parte (Suffragijs per Pilas occultè acceptis) approbatus fuerit, in Comitiis majoribus proximè insequentibus, siquidem commodè fieri poterit, fin minus, in Comitiis quibuslibet Majoribus, sive ordinariis sive extraordinariis, à Præsidente aut Propräsidente PROPONATUR in Candidatorum ordinem vel Permissorum numerum ADMITTENDUS: Et si electus fuerit, peractis iis ab ipso quæ per Statuta nostra requiruntur, quam primùm ADMITTATUR.*"

Some Cases were also cited in the Course of the Argument: The Case of Corporations, in 4 Co. 77. b. 78. a. Dr. Bonham's Case, in 8 Co. 114 to 121. Dr. Goddard's Case, in 1 Lew. 19. 1 Siderf. 29. and 1 Keb. 75, 84. S. C. upon a Mandamus to the College, to restore Him. Dr. Groenvelt's Case, in Cartbaw 491. 1 Salk. 144, 200, 263. 3 Salk. 265. 12 Mod. 119. and Holt 184. and Dr. Scombergh's Case.

The next Day, the Argument was continued; by Mr. *Absuris* and Mr. *Dunning*, for the College; and Mr. *Morton*, Serjeant *Glynn*, and Mr. *Wallace*, for Dr. *Lesth.*

Lord MANSFIELD said, He had no Doubt what ought to be done: And therefore he would not keep the Gentlemen of the Faculty any longer in Suspence.

The Counsel for the College have admitted the *Jurisdiction of this Court*: And they certainly have Jurisdiction over Corporate Bodies, to see that they act agreeably to the End of their Institution.

There is no Doubt that where a Party, who has a *Right*, has no other specific legal Remedy, the Court will assist him by issuing this prerogative Writ, in Order to his obtaining

* V. ante, such Right*.

1045 &

1266, 1267.

and 1659,

1660.

There can be as little Doubt that the College are obliged, in Conformity to the Trust and Confidence placed in them by the Crown and the Public, to admit All that are fit; and to reject All that are unfit. For, under the Reason and Spirit and true Construction of this Charter and this Act of Parliament, No Person ought to be suffered to practise Physic, but Such only as have Skill and Ability, and have diligently applied themselves to the Study, and are well grounded in the Knowledge of it: And, on other Hand, All Persons who are so qualified, and have bestowed their Time and Money and Labour in the proper Studies that tend to such Qualifications, have a Right to be admitted to exercise and practise their Profession. And the Public have also a Right to the Assistance of such a Person, who has by his Labour and Studies rendered himself capable of serving the Public by giving them proper Advice and Directions.

It is true, that the Judgment and Discretion of determining upon this Skill, Ability, Learning, and Sufficiency to exercise and practise this Profession, is trusted to the College of Physicians: And this Court will not take it from them, nor interrupt them in the due and proper Exercise of it. But their Conduct in the Exercise of this Trust thus committed to them

them ought to be *fair, candid, and unprejudiced*; not *arbitrary, capricious, or biased*; much less, warped by *Resentment, or Personal Diflike*.

Cases indeed *may* happen, where the Rejection may be founded upon *other* Grounds than Insufficiency in Point of Skill and Ability or Knowledge: It is possible, that other Causes of Rejection may occur; as *Badness of Morals*, for Instance.

But in the present Case, they seem to have acted with Candour and Caution. Some of the Gentlemen even make Oath of their Reasons against admitting this Candidate for a Licence. Objections to Persons applying for Licences to practise Physic, may be grounded on a Variety of Reasons: And the Court are to judge of such Objections and the Reasons of them. If they are insufficient, the Court may grant a Mandamus. If they should refuse to examine the Candidate, at all; the Court would oblige them to do it. In a Manuscript Book of Reports which I have seen, the Reporter cites (in reporting Dr. Bonham's Case) a Mandamus in the Time of Edw. 3. directed to the University of Oxford, commanding them to restore a Man that was *bannitus*: Which shews both the *Antiquity* and *Extent* of this Remedy by Mandamus. But the Court ought to be satisfied that they have *Ground* to grant a Mandamus: It is *not* a Writ that is to Issue of Course, or to be granted merely for asking.

The Question therefore is, "Whether here is a *proper* and *sufficient* Ground for our granting a mandamus."

Consider, then, what are the Grounds of this Application.

First—Dr. Letch can't dispute these By-Laws. This Point is not open to him. For, *without them*, he has no Ground to stand upon: He has never been examined by the Body at large. Therefore he is under a Necessity, upon *this Application*, of allowing the By-Laws to be good.

The Question then will be, "Whether the Power is ~~DE-~~
~~VOLVED~~ on the President and four Censors; or REMAINS
with the Body at large."

I am clear, that the Power *remains* with the *Body*; and that the Examination by the President and four Censors is *only preparatory*, and for the Ease of the Body at large.

There are various Instances of *Delegations* of a like Kind. Bishops refer Examinations of Clergymen to their Chaplains:

So Universities refer Examinations to select Parts of their Bodies. But the *dernier Determination* is in the Body at large.

These Censors, to whom this Examination is referred, take an Oath, "not to approve of unfit Persons, nor reject such as are fit."

The *Usage* has been, to refer the Examination of the Person applying for a Licence, to the *Comitia minora*, as more easy, and more convenient to be executed by a small than by a large Number of Examiners. But every Fellow has Notice of it, and may examine and argue with the Candidate; though he has no Vote at these *Comitia minora*: So that every Fellow has an Opportunity of informing Himself and satisfying his own Judgment concerning the Sufficiency of the Candidate. The *Comitia minora* have no Power, upon their Approbation, to admit the Candidate: They have only Power to approve. If they do approve, then the Persons so approved of by them is to be *afterwards proposed* to the *Comitia majora*, for Election: And if, upon being so proposed, he shall be elected, then he is to be admitted.

Supposing the *Comitia majora* to execute their Power corruptly, (taking this Word in a large Sense;) and that they should refuse to admit a Person who had been examined, approved, and regularly proposed to them, without being able to deny his Fitness; this Court ought indeed, in such a Case, to interpose.

But that is not pretended or even hinted to be the present Case, with Respect either to the *Comitia majora*, or the *Comitia minora*. Dr. Letch charges them with Nothing of this Kind, nor with any Thing to which it is requisite for them to give an Answer: His Counsel rely on the *Usage*.

The Question therefore is, "Whether the *Comitia majora* have acted corruptly."

Now, they have only referred him to a *second Examination*, in future: They have not absolutely rejected him.

At the *Comitia minora*, there were Three who in Truth meant and intended to ballot against Dr. Letch, though One of them made a Mistake and ballotted for him; which Mistake was declared and taken Notice of, at the very Time; and it was proposed to ballot over again: And this was disclosed to the *Comitia majora*.

This Fact (of a Mistake in the Ballot for *Approbation*) being disclosed to the *Comitia majora*, was it not extremely reasonable

sonable for them to refer the Candidate to a further Examination? I see no Injustice in this. The Intention of the Ballot was that he should be *reported unfit*: And two of the Censors now swear "that they thought him so."

I am satisfied, that the *Comitia majora* had the Power of rejecting him: And it does not by any means appear, that they have acted upon improper Grounds, or arbitrarily and capriciously.

Here is no Ground laid for demanding a Mandamus.

His Lordship concluded with a Recommendation to the College, to settle all other Matters *amongst themselves*, without coming to this Court: At the same Time intimating to them a Caution against narrowing their Grounds of Admission so much, that if even a *Boerhaave* should be resident here, he could not be admitted into their Fellowship.

Mr. Justice YATES thought that Dr. *Letch* might more properly have applied for a Mandamus requiring the College to grant him a Licence to practise within *London* and seven Miles of it. However, if he had laid a sufficient Ground for his present Application, and shewn the Court "that he had "a RIGHT to be a Member of the College," the Court ought to grant him a Mandamus, to enable him to obtain that Right*, * V. ante, 1045, 1266, and 1659. 1660.

But he has not laid a sufficient Ground for this Application. He has not shewn that he has a RIGHT to be admitted a Member of the College. And we ought not to issue a Mandamus requiring the College to admit him a Member; unless he first shews Us "that he has a Right to such Admission."

No Man can now practise Physic, until he shall have been examined and approved of, proposed, elected, and admitted. He can't be a MEMBER of the College, till all these Requisites shall have been completed in him.

This Gentleman has been examined, it is true, by the President and four Censors; and their Ballot was in his Favour, Three to two, as to their *Approbation*: But One of them declared, at the Time, "that he meant and intended his Ballot "to have been in *Disapprobation*." The President, however, considered him as *approved by the Majority*.

BUT the Determination of the *Comitia minora* is not FINAL: The Consequence of their *Approbation* is only "that "he is to be afterwards proposed to the *Comitia majora*, for "Election;

" Election ; and if they elect him, then he is to be admitted."

The TRUST was placed in the *whole Body*. The College could not *delegate* this Trust placed in the *whole Body*, to this select Part the *Comitia minora*, so as to make their Opinion *final*: But it was lawful for the College to delegate to them this Power of *preparatory Examination*; reserving to the *whole Body* the Right of *final Judgment* and *Determination*. Neither have the College in Fact delegated the *final Judgment* to the *Comitia minora*: They are *only* to examine and approve. The Candidate, if he meets with *their* Approbation, must still be *proposed* to the *Comitia majora*; and is to be *elected* by *them*. So that it is the *Comitia majora*, who are to *judge* and to *elect*: Theirs is the *final Determination*.

The *Mistake in the Ballot* at the *Comitia minora* might be a Ground for the *Comitia majora* to judge " that the Doctor " had *not* satisfied the President and Censors of his Sufficient " cy to practise Physic :" For, though according to the strict Letter the Ballot might be said to have pronounced him sufficient, yet the Majority of those who ballotted, thought and even *declared* otherwise.

Upon the Whole; as Dr. *Letch* has laid before Us *no Ground* for a Mandamus, there is no Reason for Us to grant him One.

Mr. Justice ASTON—The Question is, " Whether " Dr. *Letch* has laid a sufficient Ground for asking a Mandamus requiring the College of Physicians to admit him a Member of it."

I agree with my Brother YATES, " that he should rather " have applied for a Mandamus requiring the College to grant " him a Licence to practise Physic within London and seven " Miles of it, than for a Mandamus to admit him a Member."

No particular Method of Admission is *specified*, either in the Charter or in the Statute, The College have therefore instituted a Method; the Method which has been now disclosed to Us. And they have done right: It is a good and proper One. The Examination of the Candidate, by the *Comitia minora* is *Part* of it: But their Opinion is *not final*. The *final Determination* is in the *Comitia majora*.

* Sect. pe- By the 14 & 15 H. 8. c. 5 *. it is enacted " that the six
nult'. " Persons named in the Letters Patent, as Principals and first
" named of the said Commonalty and Fellowship, choosing to
" them Two more of the said Commonalty, be called Elects;
" and

" and that the same Elects yearly choose One of them to be President of the said Commonalty ; and as often as any of the Rooms and Places of the same Elects shall fortune to be void by Death or otherwise, then the Supervisors of the same Elects shall choose name and admit One or more, as need shall require, of the most cunning and expert Men of and in the said Faculty in London, to supply the said Room and Number of eight Persons : So that He or They that shall be So chosen, be first by the said Supervisors strictly examined, after a Form devised by the said Elects ; and also, by the same Supervisors approved." This shews, that the Makers of the Act of Parliament looked upon Those of the Faculty who resided in London, to be *Members* of the College.

The Power delegated to the *Comitia minora* is " to examine, and to judge upon the Sufficiency of the Person whom they have examined ; and they are upon Oath to act impartially therein :" But their Opinion and Judgment are *not final*. The *Election* is not any Part of their Power : It is in the *Comitia majora*.

If the Person examined by them had been approved, proposed, and elected ; then, indeed, a *Mandamus* would lie : And so it would, if the College should refuse to examine the Candidate at all.

But there are none of these Circumstances in Dr. *Letch's* Case. He has been examined ; He has been proposed ; He has not been elected : He has never acquired such a *RIGHT* as can be a *Ground* for asking a *Mandamus*.

And even as to the *Approbation* of the *Comitia majora*, upon their Examination of him—Though the Number of Balls seemed to indicate their *Approbation* of him, yet it is apparent that there was a *Mistake* in the Ballot : And it was *déclaré* at the Time. Now suppose that *Mistake* to have been the *contrary Way* ; and that the Censor who made this *Mistake* had meant to ballot FOR Dr. *Letch*, but had by *Mistake* actually ballotted AGAINST him ; would it not have been thought a very hard Case, that this should be holden a *Disapprobation* of him ; and that he should be bound down by this Slip of the Censor, contrary to this Opinion and Intention, to an undeserved and undesigned *Rejection* ?

I think the *Comitia majora* have behaved with great Candour and Moderation. They knew that the Majority of the *Comitia minora* thought the Candidate *insufficient*. They refer him to further Examination, whenever he shall find or think himself qualified to undergo it. When he shall become properly

perly qualified, he may be again examined; and being found so upon such second Examination, may be proposed, elected, and admitted in the due and regular Manner.

Mr. Justice HEWITT declined giving any Opinion
 " Whether *London-Licentiates* are * MEMBERS of the College,
 " or not :" Though he hinted, that the more he thought of it, the more he doubted it.

* This Question had been started during the

Argument : But the Court afterwards declared the Question to be *still open*. See the End of this Case, page

The present Application is for a Mandamus commanding the College to admit him a MEMBER. It is not for obliging them to grant him a Licence to practise in *London* and within seven Miles round it. The Admissions into the College are " *Societatem nostram.*" The Others, only Licences to practise within these Limits.

Dr. Letch recognizes the *By-Law* or Statute of the College, and grounds himself upon it; claiming his Right of Admission, as arising from it : And upon this Right, he applies to be admitted a Member of the College.

I think We should go a great Way, if We should say " that " a Licentiate to practise within *London* and seven Miles " round is a MEMBER of the College." Certainly, a Person not admitted can't be meant as One of those that are incorporated.

But this Gentleman has not laid a sufficient Ground of *Right*, to support a Claim to *Admission*, within this *By-Law*."

It only reposes a *Trust* in the *Comitia minora*, " to examine the Candidate." If they approve of him, they are to report their Approbation to the Society or Body at large, the *Comitia majora*. Any Member may be present at the Examination ; and ask the Candidate Questions, to try his Skill in Medicine. The Trust reposed in the *Comitia minora* relates only to his Skill in Physic : It does not extend to his *Morals*. They are not impowered to examine into them. The other Part of his Qualification they are to examine into ; and if they approve, report so ; but Nothing further : It is the *Comitia majora* who are to determine finally, and to elect.

Therefore, without entering into any other Points, I concur in the Opinion " that this Rule ought to be discharged."

THIS RULE was accordingly DISCHARGED by the unanimous Opinion of the Court.

Two Terms afterwards, v.i.z. on Friday 20th November 1767,

Sir Fletcher Norton moved for a Rule upon Dr. Akeru and others, (the four then Censors,) for them to shew Cause why an INFORMATION in Nature of a *Quo Warranto* should not be granted against them, to shew by what Authority they acted as Censors of the College of Physicians.

The Objection was, That whereas the Election ought to be by the whole Body, these Gentlemen had been elected only by a select Body; namely, by the Fellows, exclusive of the LICENTIATES; though the Licentiates demanded Admittance; which was refused to them by the Fellows, on Pretence of their having no Business there, upon that Occasion.

It was argued on Thursday 21st April 1768, by Sir Fletcher Norton and Mr. Morton, for the Licentiates; and on Monday 25th April 1768, by Mr. Yorke, (then Attorney-General,) Mr. Dunning, (then Solicitor General,) Serjeant Davy, Mr. Axburj, and Mr. Wallace, for the College; and Mr. Wedderburn, for the Licentiates. On Wednesday the 27th, Serjeant Glynn, Mr. Walker, and Mr. Mansfield, proceeded, on behalf of the Licentiates: And on the same Day, the Court, gave their Opinion.

Lord MANSFIELD took Notice, that the Figure and Consequence of the contending Parties, and the Respect due to them; the Anxiety that has appeared in the Contest; and perhaps the Spirit which has been raised on both Sides, in the Course of it; have carried the Council concerned into a very great Length of Argument, and into the Discussion of a Variety of Matter foreign to the Point directly in question before the Court upon the present Motion.

The Question properly now before Us is singly this—“ Whether the Persons applying for this Information are Fellows, and intitled to vote in the Election of Censors.” If they are, the Election of these Censors, being made in Exclusion of their Votes, is not good: If they are not Fellows, and have no Right to vote in the Election of Censors, then this Election stands unimpeached.

I consider the Words “*Socii, Communitas, Collegium, Societas, Collega, and Fellows.*” as synonymous Terms; and every *Socius* or *Collega*, as a Member of the Society or Corporation or College. The Question is, “ Whether these *Licentiates* ARE *Socii* or *Collegæ* or *Fellows*.

The *Facts* are not disputed : And there is no Doubt about the *Law*, as far as relates to the Question now before Us.

Here is a *Charter of Incorporation*. And it has been admitted on both Sides, that there has been a great Number of *By-Laws and long Usages*, which are agreed to appear upon their Books and the Extracts from them : And the Permission of these Licentiates “*to practise*” is not disputed.

But I doubt whether this *Permission to Practise*, and these *Letters testimonial* can amount to an Admission into the FELLOWSHIP of the Corporation or College.

Nothing can make a Man a FELLOW of the College, without the ACT of the College. The first Act to be done by them is the judging of the Qualifications of the Candidate. The Admission into the Fellowship is an Act subsequent to that. The main End of the Incorporation was to keep up the Succession : And it was to be kept up by the Admission of Fellows after Examination. The Power of Examining and admitting after Examination, was not an arbitrary Power ; but a Power coupled with a TRUST : They are bound to admit every Person whom upon Examination they think to be fit to be admitted, within the Description of the Charter and the Act of Parliament which confirms it. The Person who comes within that Description has a Right to be admitted into the Fellowship : He has a Claim to several Exemptions, Privileges, and Advantages attendant upon Admission into the Fellowship. And not only the Candidate himself, if found fit, has a Personal Right ; but the Public has also a Right to his Service ; and that, not only as a Physician, but as a Censor, as an Elect, as an Officer in the Offices to which he will upon Admission become eligible. In Dr. Letch's Case, the Reasons for his Rejection being called for, the Answer was, “ that “ they judged him to be unfit : And as the Legislature have vested the Judgment in the Comitia majora ; and there was no Pretence or Ground to pretend that they had acted corruptly, arbitrarily or capriciously ; that Answer was esteemed a sufficient One. And they have Power, not only by their Charter, but by the Law of the Land, to make fit and reasonable By-Laws, subject to certain Qualifications.

It appears from the Charter and the Act of Parliament, that the Charter had an Idea of the Person who might practise Physic in London, and yet not be Fellows of the College. The President was to overlook not only the College, but also “*omnes Homines ejusdem Facultatis.*” So, when then the College

College or Corporation were to make By-Laws, these By-Laws were to relate *not only* to the Fellows, but to *all others* practising Physic within *London* or seven Miles of it. The Restraint from practising Physic is thus expressed—“ *Nisi ad hoc admissus sit* by Letters testimonial under their Common Seal.” Now, what does this “ *ad hoc*” mean? It must mean “ *ad exercendum Facultatem Medicinæ*” *admissus sit*. And this is agreeable to the Words used in 3 H. 8. c. 11. concerning Admissions by the Bishop of *London* and Dean of St. *Paul's*. The Supervisal of the Censors is expressed to include not only the Physicians of *London*, but *omnes etiam qui per septem Milliaria in circuitu ejusdem Medicinam exercent*. The same Observation holds as to Punishments. This must regard those who had a Right to practise in *London* and within seven Miles of it, and were not *Fellows* of the College. These Observations convince me that the Charter had an Idea, “ *that some Persons might practise by Licence under their Seal, who were not Fellows of the College.*”

Then let Us see how the Usage was.

In 1755, they must have had an probationary Licence, before Admission into the College. Afterwards, it was to be a Probation for four Years before Admission. The College might grant such probationary Licences, with some Reason, and agreeably to their Institution. This shews that *some* Licences were granted to Persons *not* Fellows of the College. The 3 H. 8. c. 11. takes away all former Privileges; and says that no Person within *London* or seven Miles of it shall exercise as a Physician, except he be first examined approved and admitted by the Bishop of *London* or by the Dean of St. *Paul's*, calling to them four Doctors of Physic: And the Charter and Statute confirming it have left every Thing at large to the College, no Way confined or restrained by the *Fitness* of the Objects. In 1561, a partial Licence was granted to an Oculist: A Person may be fit to practise in *one* Branch, who is *not* fit to practise in *another*. Licences have also been granted to *Women*: And that may not be unreasonable in particular Cases; as, for Instance, such as Mrs. *Stevens's* Medicine for the Stone. Partial Licences have been given, for above 200 Years. Of late Years, indeed, General Licences have been usual: And the Persons applying for them have been examined, though not meant to be *Members* of the Corporation or College. In 1581, Notice is taken of *three Classes*: Fellows, Candidates, and Licentiates: And from that Time, they have given Licences to practise. The Licences probably took their Rise from that illegal By-Law (now at an End) which restrained the Number of Fellows to twenty. This was arbitrary and unjustifiable: They were obliged to admit All such as came within the Terms of their Charter. Yet it is probable

probable that the Practice of licensing was in Consequence of their having made it. However, for above a hundred Years, there has been a known Distinction between *Fellows* and *Licentiates*: It is as well known as the Distinction between *Graduates* and *Under-Graduates* in the Universities.

This being premised, let Us inquire, " Who these Gentlemen are, that are now applying to the Court."

They are Persons who set up a Title directly contrary to the Sense in which their License is given to them and received by them. They can't avail themselves of their Instrument, in this Way: It would be a Cheat upon the College. And they have acquiesced many Years under this Licence given them by the College, as merely a Licence to practise.

But even supposing them to have a RIGHT to be Fellows; yet, as it is clear that the Licence does not make them *ipso facto* Fellows, they could not VOTE in the Election of Censors before their ADMISSION to the Fellowship, and therefore the Exclusion of their Votes can not impeach this Election.

I am of Opinion, " that this Rule ought to be discharged."

If my Brothers should concur with me, the College as now constituted is at present to be considered as the Body Corporate. I have a great Respect for this learned Body. And, if they should think proper to hearken to my Advice, I would wish them to consider whether this may not be a proper Opportunity for them to review their Statutes. And I would recommend it to them to take the best Advice in doing it; and to attend to the Design and Intention of the Crown and Parliament in their Institution. I see a Source of great Dispute and Litigation in them as they now stand; There has not, as it should seem, been due Consideration had of the Charter, or legal Advice taken, in forming them.

The Statute of 14 & 15 H. 8. c. 5. after reciting the Charter, mentions it to be expedient and necessary to provide " that no Person of the said Politic Body and Commonalty " aforesaid be suffered to exercise and practise Physic, but " only those Persons that be profound, sad, and discreet, " groundedly learned, and deeply studied in Physic."

I do not say, that no Man can be a Licentiate, who is not perfectly and completely qualified to be a Fellow of the College. Many Persons of no great Skill or Eminence have been licensed: And there seem to be fewer Checks, Guards and

and Restrictions upon granting Licences, than upon the Choice of Fellows. Yet it has been said, “ that there are “ many amongst the Licentiates, who would do Honour to the “ College, or any Society of which they should be Members, “ by their Skill and Learning as well as other valuable and “ amiable Qualities; and that the College themselves, as “ well as every Body else, are sensible that this is in Fact “ true and undeniable.” If this be so, how can any By-Laws which *exclude the Possibility* of admitting such Persons into the College stand with the TRUST *reposed in them*, “ of “ admitting ALL *that are fit?*” If their By-Laws interfere with their exercising their own Judgment, or prevent them from receiving into their Body Persons known or thought by them to be really fit and qualified; such By-Laws require Regulation. Such of them, indeed, as only require a proper Education, and sufficient Degree of Skill and Qualification, may be still retained: There can be no Objection to Cautions of this Sort; and the rather, if it be true “ that “ there are some amongst the Licentiates, unfit to be received “ into any Society.” It is a Breach of Trust in the College, to license Persons altogether unfit.

I do not choose to speak more particularly: But I recommend it to those who are now likely to be established the Masters of the College, to take good Advice upon the Points I have been hinting to them.

Mr. Justice YATES observed, that upon this Application of the Licentiates, grounded upon their not being admitted to vote, it was incumbent upon them to shew “ that “ they had a RIGHT to vote.”

They Claim to be MEMBERS of the Corporation, equally with the Fellows of the College: They insist “ that the “ Charter has made them so. And it has been said “ that “ there is no other Way of continuing the Corporation;” and “ that no By-Laws or Usage can contravene the express “ Words of the Charter.”

But I am far from thinking that ALL the Men of and in London then practising Physic were incorporated by the Charter. The immediate Grantees under the Charter were the six Persons particularly named in it: The Rest were to be admitted by them. They were not *ipso facto* made Members. They were first to give their Consent, before they became Members: They could not be incorporated without their Consent.

Much less are future Practisers of Physic of and in London actually incorporated by this Charter.

If the *Inhabitants of a Town* are incorporated, yet *every* One must be admitted before he becomes a *Corporator*. The Crown can't oblige a Man to be a Corporator, without his Consent : He shall not be subjected to the Inconveniences of it, without accepting it and assenting to it. Upon moving for an Information in Nature of *Quo Warranto* against a Corporator, it is necessary to prove " that the Corporator has accepted."

The Counsel for the Licentiates insist, that their Admission, by the Letters Testimonial, " to practise Physic in *London*, and within seven Miles of it," is an Admission into the College or Corporate Body.

But this License " to practise Physic in *London* and within seven Miles of it," does by no means render the Licentiate liable to all the *Burdens and Inconveniences* of being an *actual Member* of the College.

A Man is not capable of being admitted into the College, without being possessed of certain *Qualifications* which are made requisite. But granting that he really is possessed of those requisite Qualifications, yet his *merely being qualified* for becoming a Member does not make him One. The Instrument which gives the Licence or Permission " to practise," does not mention any such Thing as an Admission to be a Member of the College. The Word "*admissus*" is only used, in this Instrument, as a more classical Term than "*permisus*:" It don't import an actual Admission into the College. The Charter and the Act of Parliament confirming it make a Distinction between the Corporation, and other Men of the same Faculty : " To govern the said Fellowship and Community, and all Men of the said Faculty;" and again, " Collegium sive Communitatum prædict' et omnes Homines ejusdem Facultatis."

A good Deal has been said about *long Usage*. But *USAGE* only applies, where the *Construction* is *doubtful*. Here, the Construction is *not doubtful*. If it were, then indeed *Usage* for 200 Years might have Weight. But that is not the present Case.

The taking Money of the Licentiates has been urged as an Argument on their Side. But taking their Money does not prove them to be *Members* of the College. If it has been wrongfully taken from them, they may recover it back again.

It has been called a *Taxing* them to be contributory to the Corporate Charges and Expences : And such a *Tax*, it has been said, can't be levied upon *Strangers*. From whence it has

has been inferred, that the College did not consider them as Strangers, but as Fellows. But this can't amount to a Proof of their having been admitted into the College; even though it should be granted to afford them a *Claim to Admittance*: It could not give them a Right to vote, as being Members of the Corporation, at the Election of Censors. The present Application is not for a Mandamus to admit them; but is grounded upon the Denial of their Right to vote, as being Members: It supposes them to have been already admitted.

I am clearly of Opinion, that the Gentlemen now applying for this Information are NOT MEMBERS of the College.

Mr. Justice ASTON, agreed, that the *Restraining the Number of Fellows to Twenty* was illegal: And He thought that the Distinction between Fellows and Licentiates had taken its Rise from the Restriction of the Number of Fellows.

He agreed also, that no Person can be obliged to be a Member of a Corporation without his Consent: And he allowed, that the Charter included only such Persons as accepted and assented to it.

But, after expressing a very high Opinion of Lord MANSFIELD's Abilities and Mr. Justice YATES's, and a modest Diffidence of his own, he acknowledged that his Sentiments upon the Construction of the Charter connected with the Act of Parliament, and the Right of Admission into the College, differed from theirs: And He thought that in Grants of this Kind, the Construction ought to be made in a liberal Manner; and this Grant includes "Omnis Homines ejusdem Facultatis et in Civitate predicitâ;" and the Application to Parliament for the Act of 14 & 15 H. 8. c. 5. (intitled "The Privileges and Authority of Physicians in London,") to confirm the Charter, is made by the Six Persons particularly named in it, "and all other Men of the same Faculty within the City of London and seven Miles about." All the Acts of Parliament made in pari materia should be taken, He said, together: And the Construction has been uniform, till the Time of Queen Mary. Till then, there was no Distinction of Major and Minor, amongst these Physicians. It seemed to Him that the Idea was, "that All Persons duly qualified, who took Testimonials under the College Seal, were to be of the Community." And this was sufficient to continue the Succession, and perpetuate it.

He should however give no Opinion, He said, how it might turn out upon a Mandamus.

As to the Motion *now* depending—He proceeded and concluded thus—But upon the Foot of the *present Application* for an *INFORMATION* in Nature of a *Quo Warranto* against the Censors, to shew by what Authority they exercise their Office; only because they have been elected *without their Intervention*, who have *NEVER BEEN ADMITTED* into the Corporation, (whatever *Claim* they may have to *demand* such *Admission*;) I am clearly of Opinion that they have laid no sufficient Ground to support it; and therefore that *THIS Rule* ought to be *discharged*.

Mr. Justice WILLES confined Himself to the Point directly and immediately in question before the Court.

These Gentlemen, the Licentiates, can have no Pretence, under the Circumstances in which they *now* stand, to object to the Election of the Censors, for Want of the Admission of *their Votes*. For, whatever *Right* they may *claim*, or whatever *Right* they may really *have*, to their *Admission* into the Fellowship of the College or Corporation; yet, as they *NEVER HAVE BEEN admitted* into it, no mere *RIGHT of Admission* (be it ever so clear and indisputable) can give them a *Right to vote* in Corporate-Elections, *before* they shall have been *admitted* into the Corporation.

Therefore they can not, *before* their *Admission*, maintain this Rule.

Lord MANSFIELD—I rest my Opinion upon *this* Ground; “that their present Application to the Court is “under an Instrument which shews that they are not *now* “Fellows of the College, nor *admitted* into the Corporation.”

I think that every Person of Proper Education, requisite Learning and Skill, and possessed of all other due Qualifications, is *invited* to have a *Licence*: And I think that he ought if he desires it, to be *admitted* into the College. But I can not lay it down, “that every Man who has a *Licence* “from the College, by Letters Testimonial, to practise Physic in London and within seven Miles of it, does thereby “actually become a Member of the College, and obtain a Right “to *vote in Corporate Elections*.”

The *Distinction* between *Fellows* and *Licentiates* has been established above a hundred Years: And these Gentlemen *have ACCEPTED* an *Instrument* which was *NOT understood*, by either Side, to convey a *Right to be ipso facto Fellows*; and it is plain, that they *never have been actually admitted Fellows*. And I am clear, that they can have no *Claim to vote*, *before Admission*.

How

How it might be, upon an Application to the Court for a MANDAMUS "to oblige the College to admit them," is another Question: I give no Opinion at all upon that.

Upon the former Point, I entirely concur with the Court.

Mr. Justice YATES—I give no Opinion how it might be upon a *Mandamus*.

Lord MANSFIELD concluded the Whole, with observing that THAT must depend upon the particular Cases of the Persons applying for such *Mandamus*, as they might be respectively circumstanced.

THE COURT were unanimous in DISCHARGING the present Rule.

Memorandum—

On Thursday 17th November 1768, Sir Fletcher Norton and Mr. Morton moved the Court on behalf of Dr. Edward Archer; and Mr. Walker, on behalf of Dr. Fothergill; for Writs of *Mandamus*, to oblige the College to admit these two Licentiates; with an Intention to try the Question "Whether the Licentiates had a Right to be admitted Fellows: And that Litigation lasted till 6th of June 1771. But they only came round to the same Point which had been already determined, as above. For these two Gentlemen had accepted Licences under the By-law of 1737: And the Court were of Opinion "that they ought not afterwards to desert it, and treat it as null and void; and set up a right of Admission under the Charter, upon the Foundation of this very Licence which they had accepted under the By-Law, upon a Supposition that the By-Law was a bad One." So that the Return was allowed, upon that Objection to their Claim: And the intended Question remained unsettled.

A fuller Account of that Matter may be given hereafter; But it would be improper to anticipate it at present.

However, I may venture to mention, in this Place, that after the Court had allowed the Return,

Lord MANSFIELD renewed his former Hint, by saying — "The College will now consider, whether they

" will trust to a Return upon these By-Laws ; or
" mend them."

I am informed " that they have done the latter."

Saturday
30th April
1768.

Rex *versus* Robert Cutbush, Common-Council-Man of Maidstone.

THIS was an Information in Nature of a *Quo Warranto*, brought against the Defendant, to shew by what Warrant he claimed to be a Common-Council-Man of Maidstone : Which is alledged to be an ancient Town and Corporation consisting of a Mayor Jurats and Commonalty ; and that the Office of a Common-Council-Man was a public Office therein.

The Defendant in his Plea, admits this : but goes on and shews a Charter of Incorporation dated 17th June 21 G. 2. by the Name of the Mayor Jurats and Commonalty of the King's Town and Parish of *Maidstone* in the County of *Kent* ; ordaining that Thirteen of the Inhabitants should be chosen Jurats, and One of the Jurats Mayor ; of which Thirteen Inhabitants, the Twelve others should be aiding and assisting to the Mayor ; and that there should be Forty of the remaining principal Inhabitants chosen to be, and should be and called the Common-Council of the said Town and Parish. That the said Charter directed that the Mayor Jurats and Common-Council should have Power of making By-Laws. That it places the Election of Common-Council-Men in the Mayor Jurats and COMMONALTY or the Majority of them. That the Corporation accepted this Charter : And afterwards, viz. on 14th March 1767, the then Mayor Jurats and Common-Council, in due Manner assembled for that Purpose, made a By-Law ; which By-Law recited the said Charter and the Power thereby given them ; and that the Commonalty of the said Town and Parish were very numerous, and the Admission of them to vote in the Election of Common-Council Men of the said Town and Parish had been found by Experience to be attended with many Inconveniences, and had from Time to Time occasioned divers Riots and Disorders and great popular Confusion within the said Town and Parish, and had very much disturbed and broken in upon the Peace good Order and Government of the said Town and Parish ; and further recited that such Inconveniences would be likely to be remedied, if the Right of electing of the Common-Council-Men of the said Town and Parish were to be confined to the Mayor Jurats and such of the Commonalty of the said Town and Parish who then were

or

or should be of the Common Council of the said Town and Parish for the Time being, and Sixty Others of the said Commonalty who were or should be the senior common Freemen for the Time being of the said Town and Parish, as they should stand in Order and Place of Seniority upon the Books of Admission of Freemen of the said Town and Parish; such Sixty not being either Mayor Jurats or of the Common-Council of the said Town and Parish. After this Recital and Preface, It is then (for the preventing the like Inconveniences for the future, and for the avoiding of popular Confusion and Disorder in the Election of Common-Council-Men within and for the said Town and Parish,) ORDAINED that upon every or any future Election of a Common Council-Man or Common Council-Men of the said Town and Parish, the Mayor Jurats and such of the Commonalty of the said Town and Parish who then were or should be of the Common Council of the said Town and Parish for the Time being, and Sixty Others of the said Commonalty who then were or should be the senior common Freemen for the Time being of the said Town and Parish, as they should from Time to Time stand in Order and Place of Seniority upon the Books of Admission of Freemen of the said Town and Parish, (such Sixty not being either Mayor Jurats or of the Common-Council of the said Town and Parish,) or the major Part of such Mayor Jurats Common Council and Sixty Senior common Freemen for the Time being of the said Town and Parish, should meet and assemble &c. and being so met and assembled should, by Themselves, WITHOUT the PRESENCE or CONCURRENCE of ANY OTHER of the Commonalty of the said Town and Parish, elect and choose One or more of the principal Inhabitants of the said Town and Parish to be a Common-Council-Man or Common-Council-Men of the said Town and Parish. They aver that the said By-Law, from the Time of the making thereof, had been and still is in full Force and Virtue, and in no wise annulled revoked or repealed. The Defendant then shews that he was elected a Common-Council-Man pursuant to this Ry-Law: And by that Warrant He has ever since exercised and still claims to exercise the said Office.

The King's Coroner and Attorney, in his Replication, prays Oyer of these Letters Patent of 21 G. 2. which being read and heard, He demurs (generally) to the Defendant's Plea: And Defendant joins in Demurrer.

This Demurrer was argued on Wednesday 27th of January last, by Mr. Cox for the Prosecutor, and Mr. Asturſt for the Defendant; and again now, by Mr. Morton for the Prosecutor, and Mr. Serjeant Leigh for the Defendant.

It would be tedious, to repeat their Arguments at large, after having so very fully reported (in my Third Volume, p.

1827 to 1841,) the Case of *The King against Spencer*, who claimed to be a Common-Council-Man of this same Corporation, under a By-Law made with the same View as the present, of excluding the most Part of the Commonalty from voting at the Elections of Common-Council-Men, by superadding a Qualification, which was neither required by the Charter nor connected with the Corporate Character of the Electors.

That By-Law, which was made on 18th August 1764, was holden to be a *bad One*. Whereupon, the Mayor Jurats and Common Council, still pursuing their Scheme of excluding the greatest Part of the Commonalty from voting at the Elections of Common-Council ; and hoping to evade the Objections taken to their former *bad* By-Law ; made this *new One*, dated 14th March 1767 ; whereby they confined the Commonalty's Right of Election to the Sixty Seniors of them, and excluded all the rest of the Commonalty (except these Sixty Seniors) from having any Share in any future Election of Common-Council-Men.

It was now insisted, on the Part of the Prosecutor, That this also was a *bad* By-Law ; a Departure from the Charter, and contrary to the Spirit and Intention of it. The Charter was obtained, they said, by the Freemen : And it recites " that it is a populous Town ;" and professes to intend and mean " to settle a certain and indubitable Method of Elections." But this By-Law varies that settled Method of Election. The Charter vests the Right of Election in *All* the Commonalty : And *All* the Commonalty amount to about 900. But this By-Law deprives Fourteen out of Fifteen of their Right, without their Consent,

They cited, in the Course of their Argument 4 Co. 77. b, 78. a. 2. *Peere Williams* 209. " A Corporation has an implied Power to make By-Laws : But where the Charter gives such Power, it implies a Negative, that they shall not make By-Laws in any other Cases." They also referred to the Opinion of the Court upon the former By-Law of 1764. In that Case of *Rex versus Spencer* *, the By-Law was " that the Common-Council should be elected by the Mayor Jurats and Common-Council and such of the resident common Freemen as should have respectively served the several Offices of Church Warden and Overseer of the Poor, respectively, for One whole Year ; or the major Part of such Mayor Jurats Common-Council-Men and common Freemen qualified as aforesaid ; without the Presence or Concurrence of Any of the Commonalty." And yet, that was holden to be bad.

* V. ante,
1827 to
1840.

But the Present By law is more liable to Objection than that was : For, the Sixty Seniors of 900 must be very old, and may be necessitous, or non-resident ; And if it should happen

happen that a sufficient Number of them can not attend, it may leave the Election to the Majority of the Mayor Jurats and Common-Council. And in Fact, upon this very Election, only Seven of the Commonalty did appear; of whom, Four came out of the Work-house.

The Counsel on behalf of the Defendant, who were to support the By-Law, answered—That as to the Charter being made in order to settle a *certain and indubitable* Mode of Election—It is no more than Words of Course in Charters; and would have been implied though not expressed.

As to the By-Law being made in Restraint of the Electors, *without* their Consent—The Mayor Jurats and Common-Council have full Power, by the Charter, to make By-Laws for the Good of the Corporation. And none can be more so, than One that prevents Confusion and Disorder: Which this does, by restraining the Number of Electors.

There is no Reason to distinguish between *this* Corporation and those mentioned in *4 Co 77. b. 78. a.* All the Arguments in that Case apply to *recent* Corporations, as well as others. Confusion and Disorder occur oftner in the Election of a Common-Council-Man, than of a principal Officer.

The Common-Council have a Right to concur in their own Election: They are *not excluded*. They do not cease to be a Part of the Commonalty. And they have as much Right to it, as the Jurats have to join in the Election of Jurats.

The Right of *Electors* may be restrained by a By-Law. In the former Case, of *Rex versus Spenser*, the By Law super-added improper Qualifications not mentioned in the Charter, not connected with the Corporate Capacity of the Electors; and was for *that* Reason adjudged to be bad. But this By-Law only *restrains the Number of Electors*, in order to prevent Riot Disorder and Confusion: It does not exclude an integral Part of those who are to elect.

Seniority is a corporate Qualification, and the most proper One that can be annexed. It is by no means a Probability of their Poverty; but rather of the Contrary. The Mayor Jurats or Common-Council may be *non-resident*, as well as the Commonalty.

THE COURT were clear and unanimous, That this By-Law was bad. They held it to be manifestly contrary to the intention of the Charter: (Which, Lord Mansfield said,

said, had passed upon hearing all Parties, and after much Litigation.)

It is made by a Part of the Corporation, to deprive the Rest of their Right to elect, without their Consent. The Charter gives this Right to the whole Body of the Commonalty: The By-Law confines it to a narrow Compass of the Sixty Seniors only. This expressly contradicts the Charter.

Mr. Justice YATES observed, that in the Case of Corporations, 4 Co. 77. b. the By-Law which was put in Question, did not vary the Constitution. And the great Ground of that Resolution "was that it must be made by *common Assent*." But a By-Law made by a Part of the Corporation to exclude the Rest, without their Assent, is not good.

And He likewise agreed to what Lord Mansfield had before observed, That where a Corporation is by Charter, and the Common-Council is created by the Charter, they ought (as being the Creature of the Charter) to be restrained from making any By-Laws inconsistent with it, or counteracting the End Intention and Directions of it: Though it may not be unreasonable to allow a greater Latitude in making By-Laws for the Good of the Corporation, to the Common-Council of a Corporation by Prescription, where the Common-Council is by Prescription, and such Prescription authorizes them to make By-Laws for the Good of the Corporation.

Per Cur'. unanimously—

JUDGMENT OF OUSTER.

Tuesday 3d Right on the Demise of Green *versus* Proctor.
May 1768.

THIS was a Case reserved for the Opinion of the Court.

In EJECTMENT. *Edward Green* was seised of a House in Saint Margaret's Westminster, a Brew-House, and the Stock belonging to it. *Proctor* agreed to purchase one fifth of it. *Green* covenanted to assign it accordingly. Articles of Partnership were entered into: In which were several Covenants. Amongst Others, *Green* covenanted that the said Trade shall be carried on between *Green*, *Ekins*, and *Proctor*, &c; and 300*l.* allotted for the yearly Rent of the House, shall

shall be paid by *Green*. He covenants also, that *Proctor* shall reside and dwell in the House, free of all Rent, except Taxes; and shall be allowed certain Perquisites, and Household Expences, and receive 6*l.* 6*s.* weekly for his Trouble &c. And he covenanted, that if he should die, his Executor should renew the Lease to *Proctor*. It was likewise covenanted, that neither Party should dispose of his Share without acquainting the Other. Then there is a Proviso that *Proctor* and his Family may use the Water of *Green's* Canal. *Proctor* alone resided in the House.

At the Trial, a Verdict was found for the Plaintiff, and 1*s.* Damages; subject to the Opinion of this Court upon this

QUESTION—“Whether upon this State of the Case, the Plaintiff has a Right to recover.”

This Question first came before the Court on Friday last, the 29th of April; and was then ordered to stand over to this Day.

Mr. *Ashurst*, on behalf of the Plaintiff, argued, that *Green* had not excluded himself from a joint Occupation. And if the Words do not import it, the Court will not force such a Construction, as seems contrary to the intention.

Green had either the sole legal Right, or was Joint Tenant with *Proctor*.

Mr. *Walker*, contra, was stopt by Lord *Mansfield*, it being a clear Case.

LORD MANSFIELD—At the Trial, I had no Doubt upon the Construction of the Articles: And none of us have any Doubt now.

The Plaintiff can not recover *against* his own Covenant. *Green* was to be a Gentleman, in this Affair; *Ekins*, to furnish Skill and Money; *Proctor*, to contribute Labour and Attendance. The House was to be appropriated to the Use of the Trade. *Proctor* was to have the Use and Occupation of it; and be bound to reside there; and to have Coals Candles &c. and other Perquisites; and the Use of a Pond which belonged to Mr. *Green*: And if *Green* should die, his Executor was bound to renew the Lease to *Proctor*. And *Proctor* did live in the House. *Green* has no Right to recover, under all these Circumstances.

Mr. Justice *YATES*—Even as a Licence to inhabit, it amounts to a Lease: And it appears most plainly to be intended that he was to reside in it.

Mr.

Mr. Justice ASTON and Mr. Justice WILLES were of the same Opinion.

Per Cur'. unanimously—

JUDGMENT OF NONSUIT.

Davison, on the Demise of Bromley, Esq. *versus* Stanley.

THIS was a Case reserved from the Assizes; upon an Ejectment, tried before Mr. Justice Yates.

The short of it, so far as concerned the Point now determined, was, That *William Bromley*, Esq. being seised in Fee, in the Year 1686, demised for Ninety-nine Years, to hold from the Day of the Date. Afterwards, *William Bromley*, upon the Marriage of *Francis Bromley* with *Ann Walsh*, joined in a Settlement with his Uncle *Francis Bromley*, and reduced his former Estate in Fee to an Estate for Life. This was a voluntary Settlement, and had a Power in it: But it was not pretended that the second Lease was made according to that Power. After this, *William* (being then only Tenant for Life) in 1693, makes a new Life for Ninety-nine Years, to the same Tenant, of the same Premises, without communicating to the Tenant the Alteration which he had made of his Estate by reducing his Fee to a Life-Estate; And this was acquiesced in, and the Rent paid and received, for Sixty Years. In the mean time, and before any Objection was made with regard to these Leases, *William Bromley* died, and his Effects came into the Hands of Lord Montfort.

The Lessor of the Plaintiff was Tenant in Tail under the Settlement; and claimed a Right to dispossess the Tenant.

The only QUESTION upon which the Court gave their Opinion, was—"Whether the Acceptance of the second Lease "operated as a SURRENDER of the former Lease."

Mr. Serjeant Nares, on behalf of the Lessor of the Plaintiff, argued that the Acceptance of the second Lease operated as a Surrender of the first.

He observed, that the former Lease is of the same Premises and to the same Person. *William Bromley* was then Tenant

Tenant in Fee. Then he becomes Tenant for Life ; and grants a Lease to the same Person for Ninety-nine Years.

The Lessee hereby allows and acknowledges the Lessor's Right to lease. *Moore* 636. *Mellorius v. May.* *Cro. Eliz.* 873. S. C. is in Point.

The next Question is—" Whether any Interest passed by " this second Lease."

It is not within the Power, 'tis true : But if it be not a void Lease, it will operate by Way of Surrender of the former.

At the Time of making the second Lease, *William Bromley* was only Tenant for Life : But he could pass the Interest during his Life.

He cited *Dyer* 140. b. pl. 43. *Whitley, Widow, and Gough* ; Where the first Lease was adjudged to be surrendered and drowned by the Acceptance of the second.

And the Acceptance of Rent nil operatur. For, the Lease became void, the Moment the Tenant for Life died : And no subsequent Acceptance of Rent could make it good. Mr. Francis Bromley then became immediately intitled to the Possession.

Mr. Price argued for the Defendant.—

Acceptance of a second good Lease, properly executed by a Person who had Power, I agree to be a Surrender of a former. But that is only where the second Lease is good. *Lit. Rep.* 268. 279. *Watts v. Maydwell.* *Hutton*, 104, 105. S. C. Sir William Jones 405. *Lloyd v. Gregory.* *Wilson, Widow*, v. *v. ante p. 1975 and 1980. and the marginal Note in 198. *Sir Thomas Sewell*, Master of the Rolls.*

If the second Lease is not good, the first is not avoided.

Now, here, the second Lease arises out of a Power ; which must be executed strictly. And here the Power arises out of this voluntary Settlement. *Chudleigh's Case*, 1 Co. 134. a. *Whitlock's Case*, 8 Co. 71. *Carter*, 20. *Keite v. Clopton*.

He cited also 1 *Ld. Raym.* 166. *Owen v. Saunders*, and *Co. Litt.* 113. to shew that it was good without Livery.

The second Lease must pass an Interest; or else it cannot be considered as a Lease.

It

It does not operate as an Estoppel.

Nothing passes by this second Lease. It is no Execution of the Power. The former Lease is not mentioned in the second. *Shepp. Touchstone* 269.

It ought to be a Reservation of the most Rent. But it had gone for more before. Sir T. Jones 110. *How v. Whitfield*.
¹ *Eq. Cas's Abr.* 3+3. *Orby v. Lady Mowbr.*

It does not operate, as ingrafted into the Settlement. It therefore does not operate at all.

In the Case of *Watts v. Maydwell*, *Littleton's Rep.* 268. the second Lease was held totally void. So in Sir William Jones 405. *Lloyd v. Gregory*, and 2 *Ro. Abr.* 495. S C. the second Lease was void; and the first still continued: The second was not good within the Proviso of 13 Eliz. but was merely void, and was no Surrender of the former Lease. It could not operate by Way of passing an Interest.

The Acquiescence of the Lessee only operates by Way of Estoppel. *Co. 352. Definition of an Estoppel*; *Litt. § 667. Co. Litt. 47. b.*

If Mr. Francis Bromley had brought an Action for the Rent, the Lessee would have been estopped to say that the second Lease was void.

¹ *Infl. 45. a.* It can not operate both by Estoppel and also by Way of passing Interest. 6 *Co. 14. b.* *Treport's Case.*

An Estoppel presumes the Lease to be good.

But if the first be not a good Lease, then the second Lease is good.

Therefore *quacunque via data*, it is with the Defendant; and the Plaintiff can't recover against him.

He observed, that the Case of *Mellows v. May*, in *Cr. Eliz.* 873. and *Moore* 636. S C. is very differently reported by those two Reporters.

Mr. Serjeant Nares, in his Reply, remarked, that the Settlement being a voluntary Settlement, Mr. William Bromley must, in Point of Law, be considered as a Purchaser for a valuable

valuable Consideration. He had two Species of Interest in him ; an *Estate for Life*, and a *Power*: And this second Indenture of Lease was good under his *Estate for Life*; though either *voidable* or *void* under the *Power*. And here is no Recital of any Power. So that the former Lease was a good one : And the taking the second was a Surrender of it. *I Leon.* 147, 148. *Read and Nashe's Case.*

Subsequent Livery upon a Lease à *die datūs*, being intended to make the Lease good, shall not destroy it. This was lately determined in the Court of Common Pleas.

This second Lease is good to pass an Interest; and is good by Way of Surrender.

Lord MANSFIELD agreed, that the Acceptance of a second *good* Lease will operate as a Surrender of a former. But the Reason does not hold, in the Case of accepting a new *void* Lease, or One that the Lessee can't enjoy.

In the present Case, Mr. William Bromley had probably forgotten that he had altered his Estate in Fee to an Estate for Life : At least, he did not tell the Lessee, that he had so done.

The first Lease was for Ninety-nine Years from the Day of the Date ; The second Lease is for Ninety-nine Years, to commence immediately ; and there is not a Word said of the Settlement or Power. The Tenant made a fair Contract, *bona fide*, for a valuable Consideration. The second Lease was a Deceit upon him : For the Lessor had no Title to grant this new Lease. But the present Lessor of the Plaintiff says he shall lose the former Lease too ; because the latter is inconsistent with the former ; and he could not hold under Both.

Where the first could be of no Use, if he had the second ; and both Parties so intended ; there is no Inconsistency in the Acceptance of a new *good* Lease being a Surrender of the former. But the accepting a new *void* Lease, which the Lessee is not to enjoy, could not shew an Intention to surrender the other. Therefore, the Reason why this should be an implied Surrender, totally fails. A void Contract for a Thing that a Man can not enjoy, can not in common Sense and Reason, imply an Agreement to give up a former Contract. And Mr. Price has shewn that the Law is so ; and that Cases of this Nature appear to have been grounded upon solid Reason, when they are well considered *.

* V. ante,
p. 1980. Sir
I am Tho. Sew-
ell's Case,
accord.

I am very clear that the Acceptance of this new Lease, which did not pass an Interest according to the Contract, can not operate as a Surrender of the former. And this is sufficient: I will not enter into any other Questions about the other Parts of the Case.

The second Lease did not pass an Interest according to the Contract.

The Plaintiff has no Right to recover.

I give no Opinion whether the Acts of the Lessor have or have not made the new Lease good for the whole of the Term.

The THREE OTHER JUDGES were clearly of the same Opinion.

Per Cur'.

Let the POSTEA be delivered to the DEFENDANT; in Order that a NONSUIT may be ENTERED.

Wednesday, *Rex versus Inhabitants of St. Lawrence in Winchester.*
4th May
1768.

See this Case in the Quarto-Edition of my SETTLEMENT-CASES, No. 190. Page 588.

Friday 6th Green and Another *versus Farmer and Others.*
May 1768.

THIS was a Case reserved for the Opinion of the Court, at *Nisi prius* at Guildhall before Lord Mansfield, at the Sittings after Trinity Term 1767.

It was an Action of Trover for several Parcels of Serges and Rackers. "Not guilty" was pleaded; Issue joined; the Cause tried; and a Case stated.

It was argued first on Tuesday 17th November last, by Mr. Mansfield, for the Plaintiffs; and Mr. Wallace, for the Defendants: And the Parties desired a second Argument. In Pursuance of which Desire, It came on again on Tuesday 26th

26th January last : When, upon some Explanations of the Facts, it being thought that they were not quite completely stated, the Court desired to be further informed of the Course of these Dealings, as it is a Question of general Consequence. And the Counsel agreed to amend the Case : Which they afterwards did.

The CASE, when amended, stated the following Facts. It appeared in Evidence that Messieurs Heinzleman purchased from the Plaintiffs the Goods in question, by the Intervention of their Packer : And they were delivered to the Defendants, their Dyers, to be dyed upon their Account, on 12th July 1766. That, afterwards, Messieurs Heinzleman and the Plaintiffs agreed " that the Plaintiffs should have their Goods back again :" Who demanded them from the Defendants, offering to pay what was due for the dying. But the Defendants insisted upon being paid a Debt due from Messieurs Heinzleman for dying other Goods, over and above what they owed for the dying of these Goods. That the Occasion of Messieurs Heinzleman's agreeing " that the Plaintiffs should have their Goods again," was their having failed in their Circumstances. And it was proved " that after Notice of this Failure, the Defendants delivered Eleven Pieces to Messieurs Aiston and Hodgson, which had been bought of them by the Packer of Messieurs Heinzleman, on their Account, and sent in like Manner, to the Defendants to be dyed on their Account ; without insisting upon being paid more than what was due for dying these Eleven Pieces ;" and " that they also delivered to the Plaintiffs Five Pieces in White, without being paid any Thing."

It was further stated, that the Goods, for the Charge of dying whereof the Defendants claim to retain the Goods now in question, had been sent in to them, dyed, and returned, at the several Times specified in their Account. And it appeared from that Account, that all the Goods, for the dying whereof the Defendants now insist upon being paid before they will part with this last Parcel of Serges and Rackers, were returned without retaining or having any other Goods : And that the Demand for dying those former Goods arose from the 1st of January 1766 to the 10th of June 1766, and before the 12th of July 1766. It appeared also, that there were several Periods, during which the Defendants had no Goods in their Hands.

A Verdict was found for the Plaintiffs, for 57l. and 40s. Costs ; subject to the Opinion of this Court upon the following Question—

" Whether,

" Whether, under the Circumstances of this Case, the Defendants have a LIEN upon these Goods, for more than the Price of the dying."

On Tuesday last, (the 3d Instant,) this amended Case was argued by Mr. Dunning, Solicitor-General, for the Plaintiffs; and Mr. Eyre, Recorder of London, for the Defendants.

Mr. Solicitor-General argued that the Defendants had no such Lien, nor any Right to retain these Goods for more than the Price of dying them.

The Right to retain depends upon a *Contract*, either express or implied.

A Taylor loses his Right to retain, if he stipulates for a particular Price. 2 Ro. Abr. p. 92. Title "Justification," pl. 1, &c 2.

So, an Innkeeper, if he delivers the Horse. If it be brought to him again, he can't retain him for the first Debt.

10 August 1754, *ex parte Shank et al'*, before Lord Hardwicke—It was held that a Ship-Builder had no specific Lien upon a Ship for Repairs, if he parts with the Possession. 1 Atkyns, p. 234.

So the present Right to retain ended with the *Return of the Goods*.

This brings the Question to the *Nature* of the Contract between these Parties.

Here is certainly *no express Contract*, to vary the Right: Nor is there any implied one.

All former Accounts were settled to the Beginning of the Year 1766. These Dyers were employed by the Merchant to dye his Goods: And there were no other Dealings between them. From the 3d to the 10th of January, they had no Goods of Messieurs Heinzeleman's in their Hands: And that was the Case at several other Times: particularly, from the 10th of June to 12th of July. Therefore they did *not trust* to this Retaining: They trusted to Heinzeleman's *personal Security*. Therefore they had no Right to retain for more than the Charge of dying these particular Goods.

As

As to the Statutes about Set-offs, which were mentioned upon the former Argument—The fair Argument from those Statutes, is “that it was thought improper by the Legislature, to carry the Provision further than they have carried it.” And it shews too, what the Laws was, before those Acts.

As to the supposed Inconvenience to Trade, and the supposed Analogy to the Case of a Factor—It is no Inconvenience to Trade: And is not at all like the Case of a Factor. The Factor is constantly receiving and paying: But the Dyer may never receive any more Goods, to dye.

The whole of this Demand was completed on 10th of June. The Dyer had no Reason to look forwards to the Merchant's sending future Goods to be dyed. There is just as much Reason to retain the Goods to answer any other Debt; &c.

He cited a Case *ex parte Ockenden*, a Miller; in the Matter of *Matthews*, a Bankrupt. ¹ *Atkyns*, 235.—*Matthews* was indebted to *Ockenden* in 286*l.* 7*s.* 10*d.* for grinding of Corn; and became Bankrupt. He had given the Miller two promissory Notes of 100*l.* each, which became due before the Bankruptcy. At the same Time, the Miller had in his Custody a Quantity of Wheat, to grind; and a great Number of Sacks. No more was due to him for grinding the Corn then in his Hande than 16*l.* 5*s.* Lord *Hardwicke* held “that the Miller had no specific Lien upon the Corn and Sacks, but only *pro tanto* as was due for grinding the Corn then in his Hands.”

*Precedents
in Chancery,
419. 2 Vern.
691, 698.

In the Case of *Demainbray and Metcalfe**, the Pawnee had the Jewels always in his Possession, as a Security for the Sums borrowed. But here, what Security had the Defendants from 10th June to 12th July; when they had no Goods of the *Heinzlemans* in their Hands? This was a subsequent Transaction.

Reports in
Equity 104.
and Abridg-
ment of
Equity
Cafes, p.

In the Case of *Downam v. Matthews*†, there had been mutual Dealings for several Years, without Payment of any Money, on either Side: Which the Lord Chancellor said was a strong presumptive Argument of an Agreement for that Purpose.

324. Pl. 4.
† Prece-
dents in
Chancery,
580. Vide
1 *Atkyns*
236. S. C.
cited by

In the Petition *ex parte Deezet*‡, there was Evidence, that it was usual for Packers to lend Money to Clothiers; and the Cloths to be a Pledge, not only for the Work done in packing, but for the Loan of Money likewise||.

‡ 1 *Atkyns*,

228.

|| Vide 1 *At-*

kyns, 237.

S. C. cited

by Lord

Hardwicke.

Here, the Defendants rested upon the personal Security of Messieurs *Heinzleman*.

Mr. Eyre, Recorder of London, argued for the Defendants, in Support of their Right to retain.

He owned, it was hard to maintain the old Cases about Liens; and that it was not easy to apply them to mercantile Transactions.

But the Right of Retainer has been considered (he said) with more Liberality, of late Years: It is now put upon the Foot of mere Justice.

At present, a Man may have the Benefit of it in *Trover*.

The Case mentioned in that of *Chapman v. Darby*, 2 *Vern.* 117. " That where there were mutual Dealings on Account between a Bankrupt and Another, the Other should only answer to the Bankrupt's Estate the Balance of the Account," was before the Act of Parliament. It was the first Extension of the Common Law, by way of Liberality. Lord Cowper had come into it sooner; considering it upon the Foot of an Account current. The Courts of Common Law did not come into it so soon.

In a Case at *Nisi Prius* at Guildhall, it was ruled " that the Defendant could not justify keeping the Goods, till he was repaid the Duty." It was an Action of *Trover*, M. 12 G. 1. before Lord Chief Justice Eyre. The Plaintiff was Captain of a Ship: and brought over some Elephants Teeth, both for his Owner and for Himself. The Owner paid the Duty for the Whole; and received the Whole. The Duty was deducted in Damages: But he could not detain the Goods for it. 1 *Stra. 651.* *Stone v. Lingwood.*

Lord MANSFIELD—Most clearly, 'tis not Law.

Mr. Eyre proceeded—An Attorney may now retain Papers, not only till he has paid the particular Debt, but for his general Balance.

The Difficulty is how to set it off in *Trover*.

Lord MANSFIELD—If it can be set off in a Court of Equity, it may be set off in an Action of *Trover*; because it is a Lien. It was certainly doubtful, before the Case of *Krutzer and Wilcock*, " whether a Factor had a Lien and could retain for the Balance of his general Account."

Mr.

Mr. Justice YATES—Wherever the Plaintiff has a *Lien*, he may retain in *Trover*, as well as in any other Action, or in a Court of Equity.

Mr. Eyre—It is as reasonable to retain, in the present Case, as in the Case of a *Factor*. A Factor must often be without Goods in his Hands, as well as the Defendants were here. There is no Reason to confine it to the Case of a Factor: It extends equally to every *Agent*; and consequently to a Packer, or a Dyer; and with equal Reason. For, the Goods are to be considered as a Pledge, from the Nature of the Dealing.

He cited the Case of *Foxcroft and Others, Assignees of Satherwaite, against Devonshire and Others, Hil. 33 G. 2. B. R.* And after repeating Lord Mansfield's Reasoning in that Case, (which see *ante*, p. 936, 937.) he applied it to the present Case.

Every Article of this Debt arose, he said, under the Security of a specific Lien.

The Goods came into the Defendants Hands, in the Course of Trade and Dealing: And a Lien upon them is implied in the Nature of the Transaction. And this tends to the Advancement of Credit, and the Benefit of Commerce.

As to the Case that has been cited, of 10th August 1754, *ex parte Shank et al.**—There the Shipwright had departed† ¹ Atkyns, with his Lien. ^{234.}

I do not put it upon the Principle of the old Cases; but upon the Principles which have obtained since the Case of *Krutzer v. Wilcockst.*

† 1st Feb.
1755. Vide
ante, vol. 2.

And upon these Principles, the Defendant is intitled to the Postea; as having a Lien for more than the Price of dying. ^{P. 494.}

Mr. Solicitor-General, in Reply—The Legislature have only taken Care of particular Cases: They have left this Case as they found it.

The Defendants never had a Lien upon these Goods, for all the several Parts of their Demand. They had a Lien for Part of it, upon other Goods: Which Lien they have parted with.

As to the old Cases—It don't rest upon them alone: I mentioned a modern One in 1754.

As to the Case mentioned in that of *Chapman v. Dormer*—
That was a *Bankruptcy*: Where one Party would otherwise
pay the Whole of what is due from him, and receive only a
Part of what is due to him.

The Case of the Jewels is very strong. And the Court of Chancery will not suffer a Mortgagee to redeem till he has paid all that is due.

Ockendon's Case and *Deeze's* are reconcileable. But if they are not, the latter Opinion must be the Authority.

The Case of *Krutzer v. Wilcocks* differs from this Case; because that was the Case of a Factor; who is not in the same Case with a Dyer, who does not proceed upon the same Ideas of future Employment. The latter can have a Right to retain, *only whilst they keep Possession*. In that Case, the Factor remained in Possession of the Goods: Here, the Dyers parted with the Goods upon which they had a Lien for the former Demand.

As these Goods were sent to the Dyer for a *particular Purpose*, he ought not to retain them for a *general Purpose*. The particular Purpose being served, the Right to the Goods results to the Owner.

It was ordered to stand over to this Day, *Friday 6th May*, for the Opinion of the Court.

Lord MANSFIELD now delivered the Opinion of the Court.

The Case is the same, as if the Action had been brought by Messieurs *Heinzleman*: For, the Plaintiffs stand in their Place. And so, I shall consider it.

The general Question is—“ Whether the Plaintiffs in this Action should be obliged to do Justice to the Defendants, “ by paying what is due to them; before they are intitled to “ demand the Goods from them, and to recover their Value, “ in Case of Refusal.”

Natural Equity says, That cross Demands should compensate each other, by deducting the less Sum from the greater; and that the *Difference* is the only Sum which can be *justly* due.

But, *positive Law*, for the sake of the Forms of Proceeding and Convenience of Trial, has said that each must sue and recover separately, in *separate Actions*.

It may give Light to this Case and the Authorities cited, if I trace the Law relative to the doing complete Justice in the same Suit, or turning the Defendant round to another Suit, which, under various Circumstances, may be of no Avail.

Where the Nature of the Employment, Transaction, or Dealings, necessarily constitutes an Account consisting of Receipts and Payments, Debts and Credits ; it is certain that only the Balance can be the Debt : And by the proper Forms of proceeding in Courts of Law or Equity, the Balance only can be recovered.

After a Judgment, or Decree "to account," both Parties are equally Actors.

Where there were mutual Debts unconnected, the Law said they should not be set off ; but each must sue. And Courts of Equity followed the same Rule, because it was the Law : For, had they done otherwise, they would have stopped the Course of Law, in all Cases where there was a mutual Demand.

The natural Sense of Mankind was first shocked at this, in the Case of Bankrupts : And it was provided for by 4 Ann. c. 17. §. 11. and 5 G. 2. c. 30. §. 28*. This Clause must have, *Directing every where, the same Construction and Effect ; whether the mutual De- Question arises upon a summary Petition, or a formal Bill, mands to be or an Action at Law. There can be but one right Construc- balanced. tion : And therefore, if Courts differ, One must be wrong.

Where there was no Bankruptcy, the Justice of not setting-off, (especially after the Death of either Party,) was so glaring, that Parliament interposed by 2 G. 2. c. 22. † and 8 G. †Sect 13. 2. c. 24. § 5. But the Provision does not go to Goods or for setting other specific Things wrongfully detained : And therefore neither Courts of Law nor Equity can make the Plaintiff who sues for such Goods, pay first what is due to the Defendant ; except so far as the Goods can be construed a Pledge : and then, the Right of the Plaintiff is only to redeem.

The Convenience of Commerce, and natural Justice are on the Side of Liens : And therefore, of late Years, Courts lean that Way—1st. Where there is an express Contract ; 2dly. Where it is implied from the Usage of Trade ; or (3dly.) from the Manner of Dealing between the Parties in the particular Case ; (4thly.) or where the Defendant has acted as a Factor.

The Case *ex parte Ockenden* was well considered. Lord Hardwick's Bias was strong on behalf of Liens : And his own Determination

Determination in the Case *ex parte Deezee* had been almost in point. Yet he took Time to consider it and search for Precedents. And after Consideration, he thought he could not construe it within the Mutual-Credit Clause of the Bankrupt-Act, unless it could be so construed in an Action of *Trover*. (And that is certainly so.) He rested upon their being no Room, in that Case, to imply a Lien, from Usage of Trade, or from the particular Manner of Dealing.

This Case, and that *ex parte Deezee*, are well reported in the printed Books : But I will read you my Note of Both.

[Accordingly, he read his own Note of the Case.]

This was in August 1754 : and it stood over : And on 20th December 1754, no Precedents being found, he determined accordingly.

And no Precedents are cited since the 20th December 1754.

Then His Lordship read his own Note *ex parte Deezee*, on the Bankruptcy of *Norton Nicholls*—“ That the Assignees could not take the Goods from the Petitioner, without making Satisfaction for the Whole of his Debt. As to a Lien in that Case, from the Nature and Course of Dealing, the Evidence is not clear.” The Opinion was “ That the Petitioner should be paid his Debt, before the Goods were taken out of his Hands.”

Though Lord Hardwicke took Notice of the Evidence of Usage, he said, it was not very clear. He thought it hard that mutual Credit should only relate to pecuniary Demands ; though Goods can only be paid for in Money : And in that Case, there was an Account between the Parties ; Wine on one Side, and Package on the other.

I have inquired into the Case *ex parte Deezee*, and the Affidavit of the Book-keeper ; [Which he particularly stated.] If the Usage there stated be true, the Packer was in the Nature of a *Factor* ; and, as such, had a Lien for the general Balance. It was settled, in 1755, “ that a Packer, being in the Nature of a Factor, would be intitled to a Lien.”

Apply this to the Case *ex parte Ockenden*, and to the present Case. In this Case, the Defendant acts in no respect as a *Factor* ; but merely as a *Manufacturer*, to dye. There is no express Contract “ to pledge :” no Usage of Trade ; no Argument from their particular Dealing : On the contrary, it appears that he trusted to Messieurs Heinzeleman’s personal Credit only. The Defendants never detained any Goods to answer

answer their Debt; but, from the 1st of January to 10th of June, gave all back: For the dying of which, they now claim to detain; without having any new Cloths sent in. After Notice of the Failure of Heinzleman, they delivered Eleven Pieces to Aiston and Hodgson, without a Claim.

It is sufficient, that *no Contract* can be *implied*, to give a Lien for the Balance, from any Usage of Trade or Manner of Dealing: But it is much stronger, when the *Manner of Dealing* shews the contrary, and that the Defendants relied on *personal Credit ONLY*.

Therefore we are All of Opinion " that there is no *Lien* here, beyond that which is given by the general Rule of Law: Which never was disputed.

POSTEA to be delivered to the PLAINTIFF.

N. B. The Price of dying was deducted at the Time of taking the Verdict; the Value of the Goods *in White* being only thereby given to the Plaintiffs.

Perkins et Al'. ex dimiss' Vowle et Al' *versus* Tuesday
Sewell et Al'. 10th May
1768.

UPON a special Verdict in Ejectment from Chester.

As to Part of the Premises—The Jury found, (amongst other Things) that *William Dexter*, being seized in Fee, enfeoffed *Henry Earl of Darby*, afterwards King *H. 4.* and his Heirs for ever. That *H. 4.*, when King, by Letters Patent under the Seal of the Dutchy of *Lancaster*, (reciting that *Margaret* the Grand-daughter and Heir of *William Dexter* had represented " that *Dexter* was dead, and that the Manor " remained in the Hands of the Crown," and expressing " that the King was willing to do that which Law and Equity " good Faith and good Conscience required,") granted the Manor to one *Mitton* and the said *Margaret* his Wife; To hold to the said *Mitton* and *Margaret* his Wife and the Heirs of the said *Margaret*, of the Dutchy of *Lancaster*; and if the said *Margaret* should die without Heirs, then to revert to the King and his Heirs.

Then the Special Verdict deduces a long Title: But it is not material to specify the Particulars; as the only Question was

was—“ Whether this Grant was within the Protection of the
“ Act of 34 & 35 H. 8. c. 20.”

It was twice very elaborately argued. But it may be sufficient to report, That the Court was of Opinion “ That the “ Grant was neither a *Gift* nor a *Reward* for Services ; but “ made as an *Act of Justice*, in Execution of some secret “ Trust or Confidence ; and therefore *not* within either the Pre- “ amble, or the enacting Clauses of that Statute.”

And JUDGMENT was given for the PLAINTIFF.

Wednesday 11th May 1768. Goodtitle, on the Demise of Alexander and Others, *versus* Clayton and Others.

SIR Fletcher Norton, on behalf of the Plaintiff, shewed Cause against granting a new Trial, in an Ejectment-Cause, wherein a Special Jury had given a Verdict for the Plaintiff, the Heir at Law of the Testator ; and the Defendants had moved to set it aside.

The QUESTION was on the Execution of a Will. The Testator's Name was Weston.

Mr. Justice Willes read the Report of Mr. Baron Smythe who tried the Cause : which was very particular and circumstantial : importing, in general, that the Evidence was contradictory ; but that he could not declare himself to be dissatisfied with the Verdict, as there was Evidence on both Sides.

[If the *particular* Report can be procured within convenient Time, it shall be inserted ; and the Page of its Insertion shall be referred to in the Table, under Title “ Will,” in the Article concerning Attesting Witnesses.]

Lord MANSFIELD thought it a very strong Case for a new Trial. He said, Its being an *Ejectment-Case* is no Reason at all against granting a *new* Trial : For, though a new Ejectment may be brought, yet here will be a Change of Possession ; by which the Defendant will be a Sufferer. This Objection against granting a new Trial, “ because a new Eject- “ ment may be brought,” has been over-ruled again and again. An attesting Witness to a Will has here come to swear against her own Attestation.

Upon the Whole of the Evidence reported, it is a clear Case for Re-Consideration.

Mr.

Mr. Justice YATES—New Trials are often granted in Ejectment-Cases as well as in others; where the Party praying a new Trial would suffer by a Change of Possession.

In the present Case, I think, the Witnesses ought not to have been admitted to give Evidence against their own Attestation.

There are Cases where *One* Witness has supported a Will, by swearing that the other Two attested; though those other Two have denied it.

Mr. Justice ASTON was of the same Opinion.—Every one of these Witnesses has acknowledged their having attested this Will. I think clearly that it requires a Re-Consideration.

Mr. Justice WILLES concurred; and thought the Weight of the Evidence appeared to be on the Side of the Defendants.

Lord MANSFIELD—I have several Cases, both upon Bonds and Wills, where the Attestation of Witnesses has been supported by the Evidence of the other Witnesses, against that of the attesting Witnesses who denied their own Attestation.

It is of terrible Consequence, that Witnesses to Wills should be tampered with, to deny their own Attestation.

Therefore—Let the Rule be made absolute, for setting aside this Verdict; and a new Trial be had: But it must be upon Payment of Costs.

RULE accordingly.

Catherine Lowe *versus* Newsham Peers.

Saturday
14th May
1768,

THIS was an Action of Covenant, upon a Marriage-Contract; being a Promise under the Defendant's Hand and Seal, and in his own Hand-writing, the Effect follows—"I do hereby promise Mrs. Catherine Lowe, that I will not marry with any Person besides herself: If I do, I agree to pay to the said Catherine Lowe 1000*l*, within three Months next after I shall marry any Body else. Witness my Hand *Newsham Peers** and Seal &c." This Deed was * These last executed in 1757. And in 1767, Peers married another Woman. Whereupon, this Action was brought.

The Name.
"and Seal,"
were subse-
quent to his

The Plaintiff avers, in her Declaration, "that she had
 " remained single, and was always willing and ready to mar-
 " ry him whilst he continued single : But he married *Eliza-*
"beth Gardiner." The Breach was assigned in Non-pay-
 ment of the 1000*l.* though demanded. The Defendant
 pleaded "Non est factum."

The Question turned upon the second Count only : For,
 it was admitted, that no sufficient Evidence was given to sup-
 port the first Court.

The Cause was tried before Lord *Mansfield*. It appeared
 in Evidence, by Letters that were read, that there had been
 a long Courtship; and that this Obligation was fairly and vo-
 luntarily given by the Defendant to the Plaintiff : The De-
 fendant pulled the stampt Paper out of his own Pocket ; and
 wrote, signed, sealed, and executed it, in the Presence of
 One Witness. And a Witness who saw it executed, attested
 it, after the Defendant was gone. There was no Intercourse
 between the Plaintiff and Defendant afterwards. The Wit-
 ness to prove this Deed swore that the Defendant *sealed it*
before he wrote his Name "*Neerwsham Peers.*" Evidence was
 called, on the other Side, to prove the contrary.

His Lordship directed the Jury to find for the Plaintiff,
 with Damages 1000*l.* if they thought the Deed to be a *good*
 Deed. If this Direction was wrong, he gave the Defendant
 leave to move for a new Trial, without Costs.

Accordingly, on *Thursday 21st April* last, Mr. *Dunning*,
 Solicitor-General, moved for a new Trial, with Liberty also
 to move afterwards in Arrest of Judgment.

RULE to shew Cause.

Upon shewing Cause on *Monday* last (the 9th Instant,) a
 Question was proposed to be debated, "Whether the Jury
 " could give any more or less Damages than the 1000*l.* the
 " specific Sum mentioned in the Deed ;" as well as " Whe-
 " ther this Instrument is good enough in Law, to support
 " any Action whatsoever ?"

It was then agreed that both Motions, (*viz.* for a new
 Trial, and Arrest of Judgment,) should come on to be ar-
 gued together.

Pursuant to which Agreement, The Case was, Yesterday
 and To-day, argued by Sir *Fletcher Norton*, Mr. *Cuff* and
 Mr.

Mr. *Wallaee*, for the Plaintiff; and by Mr. *Dunning*, Solicitor-General, and Mr. *Mansfield* for the Defendant: But the Court, in giving their Opinions upon the two Motions, entered so fully into the Grounds and Reasons upon which they founded their Determination, and discussed the Objections and Cases cited so particularly, as may render the Arguments of the Counsel unnecessary to be given here at all; or at least, more than a slight Sketch of them. The general Tendency of them was shortly this.

The Motion for a new Trial was founded upon an Objection to the Direction given to the Jury, to find the *whole Sum* of 1000*l.* in Damages, in Case they should find for the Plaintiff: The Counsel for the Defendant insisting that the Jury ought to have been left at Liberty to give a *less Sum*, if they had thought proper; the Jury being Judges of the Damages, as well in Covenant as in Assumpsit. They cited *Lev. 111. James against Morgan*; where the Jury were directed to give only the Value of the Horse in Damages, upon an *Assumpsit* "to pay a Barley-Corn a Nail, doubling it "every Nail." They also cited and much relied on Sir *Baptist Hixt's Case*, in *1 Ro. Abr. p. 703.* Title "Trial," the *pl. 9.* where a Finding of less was holding to be good; and the Jury are said to be Chancellors, and may give such Damages as the Case requires in Equity.

It was answered, That where a particular Sum is liquidated and fixed by the Agreement of the Parties and the Breach of Covenant assigned in Non-payment of that Money, that fixed Sum *alone* is the Measure of the Damages.

The Motion in Arrest of Judgment was founded upon the following Reasons—That all Engagements in Restraint of Marriage was void—That this Engagement is of that Sort—That there is no Consideration for this Contract. It is not reciprocal: Here is no Mutualty; which is essential to the Validity of a Contract.

It was answered, that this whole Transaction amounts to a mutual Promise "to marry Each Other." The Plaintiff's Acceptance of this Deed is sufficient Evidence of her making such a Promise. So that there were mutual Promises; and Both were bound to perform them. Therefore there was a Consideration for the Defendant's Promise. However, this Promise is by a *Deed*: And a Deed carries its own Consideration.

And this is not an Engagement in Restraint of Marriage generally: It is only a Restraint from marrying *any Body else, but each other.* Therefore it is not like the Case of *Baker v. White*, in *2 Vern. 215.* or that of *Woodhouse and Shepley*, in *2 Atkyns 535.* Lord

Lord MANSFIELD stated the Deed particularly, and the Declaration upon it. The Words are—“ I do hereby promise Mrs. Catherine Lowe that I will not marry with any Person besides herself : If I do, I agree to pay the said Catherine Lowe 1000l. within three Months &c.” The Defendant was single, at the Time ; and so was the Plaintiff.

The Second Count avers that the Plaintiff was ready to marry him ; and that after the making the Deed, he did marry another Woman, namely, one Elizabeth Gardiner : Yet he, the Defendant, *did not*, when requested by the Plaintiff, *pay the 1000l.* which he had agreed to pay ; and so (though often requested;) hath *not kept the Covenant made between them as aforesaid.* So that the Breach is assigned in the *not paying the 1000l.*

To this Declaration—“ *Non est factum*” was pleaded, by the Defendant : But the Jury found “ that it *was* his Deed ; and have given 1000l. Damages. And by Law and in Justice, he ought to *pay the 1000l.* MONEY is the Measure of Value. Therefore *what else* could the Jury find but this 1000l. (unless they had also given Interest after the three Months ?)

This is *not* an Action brought against him for *not marrying her*, or for his *marrying any one else* : The *Non-payment of the 1000l.* is the *Ground* of this Action—“ That he did not, when requested, *pay the 1000l.*

The Money was payable upon a Contingency : And the Contingency has happened. Therefore it ought to be paid.

There is a Difference between Covenants *in general*, and Covenants *secured by a Penalty or Forfeiture*. In the latter Case, the Obligee has his Election; He may either bring an Action of Debt for the Penalty, and recover the *Penalty* ; (after which Recovery of the Penalty, he cannot resort to the Covenant ; because the Penalty is to be a Satisfaction for the Whole :) Or if he does not choose to go for the *Penalty*, he may proceed upon the Covenant, and recover *more or less* than the *Penalty*, *toties quoties*.

And upon this Distinction they proceed in Courts of Equity. They will *relieve against a Penalty*, upon a Compensation : But where the Covenant is “ to pay a particular liquidated Sum,” a Court of Equity can *not* make a new Covenant for a Man ; nor is there any Room for Compensation or Relief. As in Leases containing a *Covenant against plowing up Meadow* ; if the Covenant be “ *not to plow* ;” and there be a *Penalty* ;

Penalty; a Court of Equity will relieve against the Penalty, or will even go further than that (to preserve the Substance of the Agreement:) But if it is worded—“ to pay 5l. an “ Acre for every Acre plowed up;” there is no Alternative, no room for any Relief against it; no Compensation: it is the Substance of the Agreement. Here, the specified Sum of 1000l. is found in Damages: It is the particular liquidated Sum fixed and agreed upon between the Parties, and is therefore the proper Quantum of the Damages.

The same Reason answers to the Motion for a new Trial in the present Case.

As to the Case mentioned by Mr. Mansfield, from 2 Ro. Abr. 703. *—It is impossible to support it: For, it can not* Sir Bap-
be, that a Man should be obliged to take less than the liqui-^{tist} Hixt v.
dated Sum. And the Writ of Error in that Case was plainly Coates.
brought by the + Defendant. Besides, the Damages could † It was so,
never be taken Advantage of upon a Writ of Error. How Vide S. C.
could the Quantum of Damages found by the Jury be the very clearly
Subject of a Writ of Error? reported, in
Cro. Jac. 590. Sir

’Tis therefore clear, that where the precise Sum is not the Baptist
Essence of the Agreement, the Quantum of the Damages may Hicks v.
be assessed by the Jury: But, where the precise Sum is fixed Coates.
and agreed upon between the Parties, that very Sum is the ascertained Damage, and the Jury are confined to it.

This brings the Matter to the Validity of the Deed.

Whatever Grounds existed at that Time, that could avail the Defendant to avoid the Deed, should have come on his Part, by a proper Plea, if it would in reality have been a good Defence for him. And therefore if any such Ground had existed in this Case, as did exist in Shepley’s Case ‡; or any † 2 Atkyns other Ground not appearing upon the Face of the Deed; it 535. Wood-ought to have been avoided by a proper Plea. Here, we are house v.
upon the Face of the Deed: The Plea is “ non est factum.” Shepley,
et è contra.

It is objected, that this is an engagement in Restraint of Marriage.

It is answered, that this Construction is directly contrary to the Words and Intention of the Deed; which amounts to a mutual Agreement between these two Persons “ to marry Each Other;” and that the Plaintiff’s Acceptance of the Deed proves that; and that what the Jury have found is a sufficient Reason to have it supposed that there was such a mutual Agreement “ to marry Each Other.” That, however that is, at the utmost, only a Contract “ that he would “ not

" not marry any other Woman ; and that if he should marry
 " any other Woman, he would pay the Plaintiff 1000l. with-
 " in three Months after he should so marry any other Wo-
 " man ;" but is very far from restraining his marrying *at all*.

This is a Point of very considerable importance.

ALL these Contracts ought to be looked upon (as Lord Hardwicke said in the Case of *Woodhouse v Shepley*) with a jealous Eye ; even supposing them clear of any direct Fraud. In that Case, Lord Hardwicke did not proceed on any Circumstances of particular actual Fraud ; but on public and general Considerations ; And therefore he gave no Costs.

These Engagements are liable to many Mischiefs ; to many dangerous Consequences.

When Persons of different Sexes, attached to Each Other, and thus contracting to marry Each Other, do not marry immediately, there is always *some* Reason or other against it ; as Disapprobation of Friends and Relations, Inequality of Circumstances, or the like. Both Sides ought to *continue free* : Otherwise, such Contracts may be greatly abused ; as, by putting Women's Virtue in Danger, by too much Confidence in Men ; or, by young Men living with Women without being married. Therefore these Contracts are *not* to be *extended* by Implication.

But here is not the least Ground to say " that this Man
 " has engaged to marry *this* Woman." Much less does any Thing appear, of *her* engaging to marry *him*.

There is a great Difference between promising to marry *a particular Person* ; and promising *not* to marry *any one else*. There is no Colour for *either* of these Constructions that have been offered by the Plaintiff's Counsel.

This is only a Restraint upon him against marrying *any one else*, besides the Plaintiff: Not a reciprocal Engagement to " marry Each Other ;" or any thing like it.

This Penalty is set up against the Defendant, after Ten Years have passed without any intercourse between the Plaintiff and him.

Another Reason why we should not *strain* in *Favour* of this Contract, is because *if* there was *really* any *mutual* Contract

Contract under fair and equal Circumstances, the Plaintiff will still be at Liberty to bring her Action : For, a void Bond can never stand in her Way.

Therefore I think, that what passed at the Trial was perfectly right ; that the Measure of Damages was the 1000*l.* and that this was such a Contract as ought not to be carried into Execution.

The Case of *Baker and White* * was not near so strong as * 2 Vern. the present Case. That was in Restraint of *Elizabeth Baker's* 21*s.* Baker marrying again. There is a Difference between a Restraint et Ux' *v.* of a first Marriage, and a Restraint of a second Marriage : *White et al.* The Plaintiff there was a *Widow*, when she gave the Bond. And the Transaction was, in Effect, a mere Wager, and Nothing at all unfair in it : And yet, in that Case, the Bond was decreed to be delivered up to be cancelled.

Mr. Justice YATES was of the same Opinion, on both Points.

In Actions of *Debt*, it is fatal to the Plaintiff, if he mistakes his Demand : because the Demand is not divisible. In *Covenant* it is divisible.

This Deed was the only Evidence upon which Damages could be given. It is a Covenant "to pay a stipulated Sum upon a particular Event." The Event has happened : The Action is brought upon it. On a Writ of Inquiry, the Inquisition would have been set aside, if less than the Sum specified had been found.

As to Sir *Baptist Hicks's* Case, in 2 Ro. Abr. 703.—What Lord Mansfield has said, is an Answer to it. The Jury ought to have allowed the stipulated Sum for every Acre that was wanting For, according to that Rate the Purchase-Money was paid, or agreed to be paid ; and according to that Rate it ought to have been allowed—or refunded : Part of the Money might have been actually paid. And on a Writ of Error, (as Lord Mansfield has observed,) the finding of Damages by the Jury could not come in question.

So far, I am of Opinion for the Plaintiff : For, I think the 1000*l.* is the proper Quantum of Damages which the Jury were bound to find.

But on the Motion in Arrest of Judgment, upon the Invalidity of the Deed—I am of Opinion for the Defendant.

For,

For, this Agreement is in *Restraint of Marriage*. It is not a Covenant “to marry the Plaintiff;” but “*NOT to marry any one ELSE* :” And yet she was under no Obligation to marry him. So that it restrained him from marrying *at all*, in case she had chosen not to permit him to marry her.

An Action of Covenant must be founded on the Covenant; and the Breach assigned within the Words of it.

Now if she had requested him to marry her, and been refused by him; how must she have assigned the Breach?—Why—“ That he being requested by her to marry her, he ‘had refused to do so.’”

But what Obligation was he under, “*to marry her?*” Or where was the Breach of his Covenant? This Covenant says no such Thing, as “*that he would marry her,*” Tender and Refusal must apply to the Thing stipulated: But he has not stipulated “*that he would marry her.*”

As to Mutuality of Contract—The Deed does not import that she shall marry him: Neither doth her Acceptance of it import any such Thing. It does not follow from her Acceptance of the Deed, that she either understood he meant to bind himself to marry her; or that she engaged to marry him.

Possibly, he might not at all mean to marry *her*, though he bound himself not to marry any one else. They are two quite different Things: One does not follow from the Other.

This Covenant is illegal, and will support no Action: And therefore the Plaintiff ought to recover *Nothing* upon it.

Mr. Justice ASTON concurred, upon both Points.

As to the *Quantum of Damages*—That is expressly stipulated and agreed. He took notice of what is said in the Case of *Sir Richard Edgcomb, K. B. v. Rowland Dee, Vaughan 101.* and applied it to the present Case.

As to the great Point—He said, He *had had Doubt*: But now he clearly concurred.

If this had been a Covenant “*to marry her,*” all the Consequences which have been mentioned would have followed.

But

But it is *not* a Covenant “to marry her.” The Words import no such Thing: And the Court *can not suppose* Fraud. It is only a Covenant to pay a Sum of Money, *in Case* he shall marry any one *else*, “any Person *besides* herself.”

This is in *Restraint of Marriage*, and is *illegal and void*.

The Case of *Baker v. White* * was a Bond given by a * 2 Vernon Widow, conditioned to pay the Defendant *White* 100l. if she should afterwards marry again: And *White*, at the same Time, gave her a like Bond, conditioned to pay the like Sum to her Executors, if she should not marry again before she died. She married again, to *Baker*: And he and she brought their Bill, to have her Bond delivered up. And the Bond was decreed to be delivered up, to be cancelled. He observed, that there is a Difference between a *first* and a *second* Marriage. The Restraint of a *first* Marriage is contrary to the general Policy of the Law, the Public Good, and the Interests of Society: But the frequent Customs of Copyholds intimate that the Restraint of a *second* is not so. Yet there the Bond was decreed to be delivered up.

We *can not make* a Covenant for the Man: And he himself has only covenanted “*not to marry any other Person, besides the Plaintiff.*”

Mr. Justice WILLES also concurred.

1st. No new Trial ought to be had. The Direction of my Lord Chief Justice was right. For, here the Deed itself liquidated the certain Sum: It was ascertained and fixed, between the Parties themselves; and was therefore the true and proper Quantum of the Damages.

2d. And to the Motion in Arrest of Judgment—I should not think it a proper Motion, if this was a Covenant “*to marry HER.*” But this is only, “*not to marry Another.*”

The Words are plain and manifest: And the Intention seems to have been *agreeable to them*. The Deed was executed in 1757: And the Defendant did not marry till 1767. The Plaintiff lay by, and never made a Requisition to him “*to marry her:*” But when he married Another, she brought her Action of Covenant.

It seems to me, to have been understood between the Parties themselves, and even by the Plaintiff herself, in the same Sense as we understand it now.

If so, 'tis a *Restraint upon Matrimony*, and is *illegal*, and stronger than the Case of *Woodhouse v. Shepley*.

Lord MANSFIELD—

Let the RULE for a NEW TRIAL be DISCHARGED :
But the JUDGMENT must be ARRESTED.

This Rule (mentioned *ante*, p. 2226.) was drawn up, for the Plaintiff to shew Cause why the Verdict should not be set aside, and a new Trial had between the Parties : And in case the Court, upon hearing Counsel on both Sides, should be of Opinion to discharge the Rule, that then the Defendant should be at Liberty to move in Arrest of Judgment.

MEMORANDUM—This Judgment was affirmed in the Exchequer-Chamber, on 26th May 1770.

The End of Easter Term 1768, 8 G. 3.

Trinity

Trinity Term

8 Geo. 3. B. R. 1768.

Alderson and Others, Assignees, *versus* Temple.

Friday 10th
June 1768.

THIS was an Action of *Trover* brought by the Plaintiffs as Assignees of *Charles La Roche* and *Robert Willing*, Bankrupts, against the Defendant

The first Count of the Declaration sets forth, that the Plaintiffs, as Assignees, on 7th Nov. 1766, were possessed of a promissory Note drawn by *Bryer* and *Everard* for 600*l.* payable to *La Roche* and *Willing* or Order, before they became Bankrupts : which Note was accidentally lost, and came to the Hands of the Defendant ; and he converted it to his own Use. The second Count was for another Note, made by one *Rachael Phipps*, to one *Richard Blackburn* for 439*l.* and indorsed to the said Bankrupts in like Manner.

To which Declaration, the Defendant pleaded “ not guilty :” And thereupon Issue was joined.

The Cause came on to be tried at *Guildhall*, at the Sitting after last *Hilary Term*, before Lord *Mansfield* ; when the Jury found for the Plaintiffs upon the first Count, subject to the Opinion of the Court upon the following Case ; and for the Defendant, upon the second Count.

CASE. The Bankrupts *La Roche* and *Willing*, on Friday 7th Nov. 1766, indorsed the Note in question to the Defendant *Temple*, to whom they were indebted to a large Amount ; and sent it in a Letter directed to him at *Trowbridge* ; which Letter was carried to the Post House that Morning ; the Bankrupts thinking that the Post Day for *Trowbridge*. The Letter, by the Course of the Post (which went out on the Saturday Night) was received by the Defendant

fendant some Time on *Monday* the 10th ; and could not be so before.

The Note in question was—“ *London, 10th Octob. 1766.*
 “ Two Months after Date, We promise to pay Messieurs *La Roche* and *Willing*, or Order, Six hundred Pounds, for
 “ Value received.”

The Bankrupts had given *Bryer* and *Everard* Two Notes for 300*l.* each ; which had not been discharged. *La Roche* and *Willing* committed Acts of Bankruptcy on Saturday the 8th. And the said Note was so indorsed, and sent to the Defendant in Contemplation of their Insolvency and subsequent Failure.

The Question for the Opinion of the Court was—“ Whe-
 “ ther the Plaintiffs ought to recover.” If not, they were to be nonsuited.

This Case was argued by Mr. *Chambers*, for the Plaintiffs; and Mr. Solicitor General, for the Defendant.

Two Questions were raised upon it. First—“ Whether the Bankrupt’s Property in the Note was *devested* before the Act of Bankruptcy was committed by him.” Second —“ Whether a Trader can, in any Case, give such a Preference as this.”

Mr. *Chambers* insisted that the Property of the Bankrupts in this Note was *not* devested. He urged, that mutual Consent is necessary to all Contracts : Whereas here was none on the Part of the Defendant. If this Note had been lost, it would have been the Risque of the Owner : The Defendant would not have borne the Loss. He had not agreed to accept it : Possibly, he might have declined doing so. And the Bankrupts might have countermanded it. Their Bankruptcy is a Countermand and Revocation. *Vide Jenkins’s 3d Century, Case 9. p. 109. Digest, Lib. 41. Title 2. Law 38.* (Master writing a Letter to a Slave ; the Property in him is not devested, till the Letter is received.) *Lane v. Cotton et al’.*

**Vide ante, al’ Cartherw 487. 2 Athyns 562. 1 Atkyns 15. 1 Atkyns p. 2174. 245. Snee and Baxter, Assignee of Tollet, against Prescot and Others ; and the Case of Hague and Others, Assignees of Ann and Isaac Scott, against Rolleston*, H. 8 G. 3. in this Court.*

He insisted, secondly, that it is not in the Power of a Bankrupt to make such a Preference as this. Reason and Equity require that all the Creditors of a Bankrupt should be put upon an equal Footing : And this is the View, End, and Intention

Intention of the Bankrupt-Laws; which are to be construed liberally for Creditors.

Mr. Solicitor-General (*Dunning*) on the other Side argued, that the Property was devested. That a Disagreement shall not be presumed; but, on the contrary, an Acceptance shall be intended, unless the contrary appears: The Contract does not stand open till Agreement; but is complete, unless there be an actual Disagreement. This Letter could not have been recalled, after it was once put into the Post-Office. A Delivery to One, to the Use of Another, upon a precedent Consideration, is not countermandable; but vests the absolute Property in that other Person, before his Agreement to it. In Proof of all which, he cited the Case of *Atkin v. Parwick*, in Sir John Strange's 1st Volume, page 165. and he also mentioned the Case of *Peter Harris v. Peter De Bervoir*, in *Cro. Jac.* 687.

As to the Preference of the Defendant to the other Creditors, He said it was very just and reasonable to give it in the present Case: And there is no Authority to prove that such a Power may not be exercised by a Bankrupt, where it is just and reasonable*

He rehearsed the Case of *Small and Oudley*; and cited *Wil- 1774, Har- son v. Day*, as a Proof that an Assignment of Part of the Ef- fects is good, if Possession is delivered.

But THE COURT were of Opinion for the Plaintiffs, on the Pre-
the Assignees of the Bankrupts. They held this Indorsing ference
and Sending the Note, under the Circumstances stated, to be given to
fraudulent upon all the other Creditors, and particularly Mr. Fisher
Messieurs Bryer and Everard. by Fordyce,

*Vide post,
14th June
man and
Others
versus
Fisher; up-

RULE—That the POSTEA be delivered to the PLAINTIFFS.

I was not present when the Court pronounced this Rule; being, at that Time, confined with the Gout. Therefore this is all that I can report, as from Myself. But as I am informed that Lord Mansfield was very copious in delivering his Opinion, and laid down several Positions which well deserve to be kept in Memory, I have, by the Favour of a very eminent Barrister and most excellent Note-Taker, procured the following Account of what his Lordship said: Which, being more accurately taken down than I should have been myself capable of taking it, had I been present, must therefore be more satisfactory to the Reader, than any Report of my own could have been.

Lord

Lord MANSFIELD—This is an Action of *Trover*, brought by the Assignees of *Laroche* and *Winning*, for a Note of 600*l.*: And there is a Verdict for the Plaintiff, upon the following Case—

The Bankrupts, upon the 7th of November 1766, indorsed the Note in Question; which is in the Words following: “*London, 10th Octob 1766. 600l. Two Months after Date We promise to pay to Messieurs Laroche and Winning or Order, 600l. Value received:*” and is signed by *Bryer* and *Everard*. The Note is indorsed by the Bankrupts to the Defendant, to whom they were *indebted, to a larger Amount*; and was sent to Him in a Letter directed to *Trowbridge*, which was carried to the Post that Morning, and was received on the 10th, and could not be received before.

The Bankrupts had given *Bryer* and *Everard* two Notes for 300*l.* each; which had not been discharged.

Laroche and *Winning* committed several Acts of Bankruptcy on the 8th.

The Note was so indorsed and sent to the Defendant by the Bankrupts, IN CONTEMPLATION of their Insolvency and Bankruptcy.

UPON this Case, the QUESTION is, “ If the Plaintiff ought to recover.”

And it is material to observe a great deal that is not stated in it. First—There never was any Course of Dealing between the Bankrupts and the Defendant, by way of indorsing or sending Notes to Each Other. The next Thing is, that the Letter in which the Note was sent, is suppressed by the Defendant. It is not found “ that the Note was indorsed in Payment of any Debt:” It is only said “ He was a Creditor to a large Amount.” It is not said whether it was to be received at the *Risque of Temple*; or only as Agent of the Bankrupts: But the Letter, which was in the Power of the Defendant, was not produced; and so the Case stands without any Approbation of the Note. The Case is silent in these Particulars; and very materially so.

It is found “ that *Bryer* and *Everard* were Creditors of the Bankrupts to just the same Amount, for two other Notes they had taken in Exchange;” and “ that those two Notes were not discharged.”

The

The only QUESTION I make is—" Whether, under
 " the Circumstances of the Case, the Indorsing and Sending
 " this Note to the Defendant is FRAUDULENT; and VOID,
 " as such."

And I choose to put the Case upon *that* Ground; because the most desirable Object in *all* judicial Determinations, especially in *mercantile* ones, (which ought to be determined upon natural *Justice*, and not upon the Niceties of Law,) is, *to do substantial Justice*. And therefore I will avoid laying the Stress that might properly be laid upon the *Affent* being necessary to *complete* the Contract, or the *Want of a Delivery*: the solid Ground of which is, that a Contract shall be presumed complete upon any Distinction where the Justice of the Case requires it, though there is no *actual Delivery*. And it is settled " that if a Man send Bills of Exchange, or con-
 " sign a Cargo; and the Person to whom he sends them has
 " paid the Value before; though he did not know of the send-
 " ing them at that Time, the sending them to the Carrier
 " will be sufficient to prevent the *Assignees* from taking these
 " Goods back, in case of an intervening Act of Bankrupt-
 " cy :" But if Goods or Bills of Exchange are sent, and the Consideration has not been received, the Court of Chancery always interposes; and there are Numbers of adjudged Cases of that Kind, in Chancery. In the Case in * *Strange*, there *Atkins v.
 is no Doubt but the Honesty of the Case inclined the Court Barwick,
 to the Judgment they gave: The *Reason given* turns upon a v. 1 Sir
 Subtilty. The Court of Chancery, in that Case, would have J. Str. 165.
 interposed, and said " the Assignees should not have the
 " Goods without paying the Price." I think the Determination was right; and there was an *actual Delivery* to a Person who became a Trustee: But a Post-Boy is not a Trustee. I think the Case was well supported upon other Grounds than those mentioned in the Book.

I ground my Opinion upon *this*, " Whether the Indorsement be *fraudulent*." And as to *that*, it is certain that the Statutes of Bankruptcy leave a Trader, to the Moment of an Act of Bankruptcy committed, every Power an Owner can have over his Estate. The Statute says +— " Fraudulent + v. 1 Jac.
 " Conveyances shall be an Act of Bankruptcy." Other Acts 1, c. 15. § 2.
 that are fraudulent are not made Acts of Bankruptcy: But they are attended with the Consequences of Fraud, *at Law*; which is, " that *Fraud* renders *every* Act void."

ALL Acts to defraud Creditors or the Public Laws of the Land are *void*: And if the Nature of the Act be a *Conveyance* or *Grant*, 'tis not only *void*, but an *Act of Bankruptcy*. It has been determined " that a Conveyance by a Trader, of all his Effects, for the Payment of one or more bona fide Creditors

" Creditors of the most meritorious Kind, though his Effects do not amount to Half what is due, is void ; because it is not an Act in the ordinary Course of Business; It is not such an Act as a Man could do, but it must be followed by an immediate Act of Bankruptcy, and it is defeating the Equality that is introduced by the Statutes of Bankruptcy, and the Criminal (for the Bankrupt is considered as a Criminal) is taking upon him to prefer whom he pleases." But suppose he leaves out a considerable Part of his Effects : If it appears to be only colourable, that don't vary the Case ; it is fraudulent. Suppose a Trader makes a Conveyance of all his Estate, for the Payment of all his Creditors except one,

*Vide ante, (which was the Case of * Gayner cited in Demattos's Case,) p. 477. it is void. Suppose it was, " to pay all his Creditors rateably :" If there were no Assent of his Creditors, or Composition, it would be void : For, it would be Rescinding the whole System of the Bankrupt-Laws, and instead of applying to the Great Seal, he would choose his own Trustees. If this is a fraudulent Act, it is void.

A general Question has been started, " Whether in any Case, upon the Eve of a Bankruptcy, a Man may do that which in consequence prefers a particular Creditor :" And that has been argued as a general Question.

But that will depend upon the *Act*. As, if a Bankrupt, in Course of Payment pays a Creditor ; this is a fair Advantage, in the Course of Trade : Or, If a Creditor threatens legal Diligence, and there is no Collusion ; or begins to sue a Debtor ; and he makes an Assignment of Part of his Goods ; it is a fair Transaction, and what a Man might do without having any Bankruptcy in View. Suppose such a Case as †Vide ante, † Small and Oudley ; There it was for the Advantage of the p. 480. Creditors, and no Fraud to them ; and if Part of the Transaction were set aside as fraudulent, the whole must. But it never entered into the Mind of any Judge, to say " that a Man, in Contemplation of an Act of Bankruptcy, could sit down and dispose of all his Effects to the Use of different Creditors :" For, that would be a Fraud upon the Acts of Bankruptcy. But if done in a Course of Trade, and not fraudulent, it may be supported.

THIS was not done in a Course of Trade : For, there never was any Dealing between the Parties in fending indorsed Notes. There was no Application made by the Defendant. And it was done with a View to positive Iniquity : For, the Bankrupts had received this Note from Bryer and Everard, for Notes of the same Value ; and knowing they should become Bankrupts the next Day, to defeat Bryer and Everard of setting off their Notes against it, indorse this Note to another Person. And there was no Way of doing Justice to

Bryer

Bryer and Everard, but supporting the Claim now made by the Assignees. So that there was express particular Fraud, at the Time the Fact was done. Next, 'Tis an Act that is, most certainly, *not complete*, as between the Parties. The Argument in the Case of * Scott is very applicable to the present. For, there was a Preference given to a *bonâ fide* Creditor : But he knew nothing of it. Suppose, in the Course of Trade, a Bill is sent to Constantinople, and a Bankruptcy happens in England before it arrives ; yet it may be good. But here, it is done, because they were resolved to commit an Act of Bankruptcy.

The THREE OTHER JUDGES agreed that an ASSENT is necessary to complete every Contract ; That in the present Case, the Defendant has his Election till the Tenth of November, That the Act of Bankruptcy being committed on the Eighth, the Contract was incomplete ; and That, upon the whole Circumstances taken together, the Transaction was fraudulent and void.

Per CUR'. unanimously.—

Let the POSTEA be delivered to the PLAINTIFFS.

Rex *versus* Smart.

Monday
13th June
1768.

THIS was upon an Information in Nature of *Quo Warranto*, to shew by what Authority the Defendant exercised the Office of an Alderman of Malden.

This Corporation consisted of Three integral Parts ; the First of which was not a Mayor, or a *single* Bailiff, but Two Bailiffs. The Charter directed the Time and Manner of their Election, as may be seen *ante p. 2130 and 2131.* in the Case of *The King against Charles Malden* : in which Case, Judgment of Ouster was given against the said *Charles Malden*. One of the then Two Bailiffs, for Want of a proper Swearing in. The present Defendant, Mr. Smart, was chosen an Alderman at a Corporate Meeting where *Jonas Malden* and this *Charles Malden* who was afterwards ousted, presided as Bailiffs. He was chosen by a Majority of the collective Body, then present.

The whole Corporation, when full, consists of Two Bailiffs, Six Aldermen, and Eighteen Head-Burgesses.

The Question was—“ Whether the Election of the Defendant was legal ; since a Judgment of Ouster had been given

ended at it, together

" given against Charles Malden who pr
" with Jonas Malden, the other Bailiff."

Mr. Wallace, (on Wednesday the 11th of last Month,) argued for the Defendant. He said, that "major Part" means the major Part of the whole Number; and that it is not necessary that there should be a major Part of the Two Bailiffs, or that both Bailiffs must necessarily be present.

The Election might be by a Majority of the Body present, even against the Opinion and Vote of both Bailiffs and all the Six Aldermen. A major Part of the collective Bodies are enough to do the Act.

It will be objected, "That there being only One good Bailiff, no Business could be done."

But it is not necessary that either of the Three integral Parts of the Corporation should be full: For, the Consequence would be, that if the Office of any One Bailiff or even any One Head Burgess was vacant, or the Person absent, there could be no Election at all.

Mr. Aburft, contra, for the Prosecutor.

The Head-Office must be full. It is an *integral* Part, and here consists of Two Bailiffs: They Two make but One Officer. It is only One Office: And, to do a Corporate Act, both must be present and concur.

In the City of London—"When One Sheriff dies, the Other can not act. He is no Sheriff: He must wait till Another be made." 1 Show. 289. *Jones v. Bean*, (or Beau. Vide 4 Mod. 16. S. C.)

In a Corporation aggregate consisting of Two Bailiffs and a certain Number of Burgesses, the Bailiffs are an integral Part of the Corporation; and they Both make but One Officer; The one can not act without the Other. *Mod. Cases in Law and Equity* (8 Mod.) 303, *Salter v. Grosvenor*.

* The

Words are,

"that the

"Bailiffs

"and

"Head-

"Burghesses

"or the

"major

"Part of

"them for

"the

"Time be-

"ing,"

should elect

the new Al-

derman.

The Words of the Charter make it necessary that Both Bailiffs shall be present *.

If the Two Bailiffs are present, it is a good Corporate Assembly: And in such Case, I agree that an Election by a Majority of the whole Body assembled is good. But here was only

One

One of the Persons who constitute the Head Officer present, instead of *Two* : Therefore the Election was not good.

Mr. Wallace, in Reply—It might be as well said, “ That All the Aldermen must be present.” The Bailiffs do not here appear as Head-Officers, as in a *Corporate Assembly*: This is only a *special Power lodged* in the Two Bailiffs, Six Aldermen, and Eighteen Head-Burgesses.

If Two Bailiffs are necessary to meet for Election of an Alderman, the Corporation is *dissolved*. The Presence of some Part of every integral Part is indeed necessary to make good an Election: But it is not necessary that *all* should be present.

N. B. Upon this Argument, It seemed to be agreed by the Court and Bar, that there would have been no Difficulty, if the Corporation had been “ Mayor Aldermen and Head-Burgesses,” instead of *Bailiffs Aldermen and Head-Burgesses*.

ULTERIUS CONSILIIUM.

On Saturday last, It was argued a second Time, by Mr. Solicitor-General for the Defendant, and Mr. Morton, for the Prosecutor; and was then ordered to stand over this Day, for the Opinion of the Court.

And now,

Lord MANSFIELD shortly said—In that Case of *Maldon*, on Saturday, We are of Opinion “ that *Two* Bailiffs are necessary as presiding Officers.” If the Corporation had chosen but One Bailiff, there had been no Head-Officer at all.

All our Wishes were with you, Mr. Solicitor : But we can not possibly help you.

There is no considering them in any other Light, than if they had been a Mayor.

There must be JUDGMENT for the CROWN.

RULE—That Judgment be entered for the King against the Defendant.

Wednesday
25th June 1768 Rex versus Mayor, Bailiffs, Burgesses and Town-Clerk of Liverpool.

ON Thursday 12th November last, Mr. Wallace moved for a *Certiorari* to remove an Inquisition, and a Verdict thereon taken before the Sheriff of Lancashire, by Virtue of a Private Act of Parliament, (8 Ann. c. 25.) intitled—"An Act to enable the Corporation of Liverpool to make a Grant to Sir Cleeve Moore Bart. for Liberty to bring fresh Water into the said Town of Liverpool:" Upon which said Inquisition the Jury have determined upon their Oath, that there should be paid allowed and given to and amongst the several Owners and Occupiers of Land Soil and Ground in the said Inquisition particularly mentioned and described, the Sum of 176l. 4s. 9d. Farthing, in the several Proportions therein mentioned; and which said Inquisition and Verdict thereon have lately been carried into and are now kept amongst the Records and Writings in the said Town of Liverpool.

Mr. Wallace cited the Glamorganshire-Cafe reported in Lord Raym. 580. and in 12 Mod. 403. and Comyns 86. S. C. to shew that a *Certiorari* would lie in this Cafe.

The COURT said—There can be no Doubt of that, if it is not prohibited by the Act of Parliament.

THESE PROCEEDINGS having been afterwards returned up by *Certiorari*, and a Motion made for quashing them;

Mr. Dunning, Solicitor-general, for the Prosecutor (Mr. John Jordan, Assignee of Sir Cleeve Moore,) shewed Cause why the Inquisition, and the Verdict taken thereupon, and also the Judgment should not be quashed.

The Objections that have been made are Three—

1st. It does not appear that the Lands were necessary for the Conveyance of the fresh water through them.

2dly. The Damages were assessed by the Lump.

3dly. No proper Notice was affixed and given, as is requisite.

In answer to the first Objection—It is not necessary that it should appear. The Requisition of Sir Cleeve Moore or his Assigns

Assigns is sufficient to vest the Jurisdiction in the Sheriff : Nothing more is required.

2dly. The Damages are properly divided. Therefore the Objection is not true in Fact.

3dly. If the Terms are not complied with, Mr. *Jordan* can not have any Advantage from his Inquisition. The Notice don't indeed appear upon the Inquisition : Nor is it necessary that it should. The Party is to give the Notice. The Sheriff has nothing to do with the Notice ; which is an anterior Act, to be done Twenty Days before the Inquisition.

Mr. Lee, contra—The general Objection is, “ That the “ Act of Parliament has not been strictly and properly pur-“ sued ; so as to give the Sheriff Jurisdiction to what he has “ done.”

1 Burr. 377, Rex v. Manning. It must appear that the Authority has been pursued. [*Vide ante*, p. 377 to 383.]

Lord MANSFIELD thought that *Notice* ought to have been given to the Parties interested in the Lands ; and, that it *ought to have appeared* upon the Inquisition, and also to shew that there was a *Jurisdiction*.

Mr. Justice ASTON was of that Opinion—The Sheriff was to specify the Time and Place of the Jury's Meeting ; and to affix the Notice on the Church Door ; and specifically, if he can, to the Party's Door whose Lands are to be affected.

Mr. Justice WILLES was of the same Opinion for the same Reason, “ that the *Jurisdiction* ought to appear.”—Now, *without* Notice he had no Jurisdiction. The Sheriff was to give the Notice : And he should have shewn it. We can not intend an inferior Jurisdiction, unless it be properly set out. If it had been properly set out “ that Twenty Days “ Notice was given, pursuant to the Act,” then the Inquisition and Judgment had been conclusive against the Owners of the Lands.

Per Cur'. unanimously—

RULE made ABSOLUTE for quashing the INQUISITION,
VERDICT and JUDGMENT.

Tuesday
16th June
1768.

Rex *versus* Inhabitants of East Donyland.

See this *Cafe* reported at large, in the Quarto-Edition of my
SETTLEMENT-CASES, N^o. 191. Page 592.

Friday 16th Fen, on the several Demises of William Lowndes,
June 1768. the Younger, and Henry Lowndes, Esqrs. *versus* William Lowndes the Elder, and William Lowndes Stone Esqrs.

IN EJECTMENT At the Lent Assizes at Bedford 1768, a Verdict was found for the Plaintiff ; subject to the Opinion of the Court on the following *Cafe*—

Thomas Layton, being seised in Fee-Simple, of and in the Manor &c, and divers Messuages Lands &c, on 20th May 1723, by his last Will and Testament in Writing duly executed, gave and devised in the following Words—

“ Item—I give devise and bequeath unto my dear and loving Wife (which I declare to be in Lieu and full Satisfaction of any Dower that she may have or lawfully claim out of any of my Messuages Lands Tenements and Hereditaments whereof I shall die seised or possessed of, or otherwise intitled unto, either in Law or Equity,) All those my Messuages Lands Tenements and Hereditaments at West Cotton End in the Parish of Wilhamstead in the County of Bedford, now in the Occupation of James Cox (et alia;) and also all the Rents and Profits issuing and arising out of the Manor of Wootenhoe in the Parish of Wooten in the said County of Bedford, during the Term of her natural Life. Item—I give bequeath and devise my aforesaid Manors Messuages Lands and Premises herein before given and devised to my said Wife during her natural Life, and after her Decease, to my Daughter Margaret Lowndes (now the Wife of William Lowndes junior Esq.) for and during the Term of her natural Life ; and after her Decease, to my Grandson Layton Lowndes, the second Son of my said Daughter Margaret, and to the Heirs Male of his Body ; and for Want of Issue Male, to the Issue Female of his Body lawfully to be begotten ; and for Want of such Issue, to such other Son of my said Daughter Margaret—if my Grandson Layton Lowndes should live and

" and be the *Eldēſt*, then to ſuch Son who ſhall be the ſe-
" cond Son of her Body living at the Time of her Deceafe,
" by the ſaid William Lowndes her preſent Husband; and if
" but ONE Son living at the Time of her Deceafe, then to
" ſuch only ſurviuing Son and his Heirs for ever. And for
" Want of Issue Male at the Time of the Deceafe of my
" ſaid Daughter, by her preſent Husband; if more than
" One Daughter, then do I appoint that the ſaid Estate
" herein before deuized ſhall be ſold to the best Purchaſer or
" Purchaſers as can be got for the ſame; and the Money
" arifing by ſuch Sale to be equally diuided to and amonſt
" all and every the Daughters by her preſent Husband, ſhare
" and Share alike, as ſhall be living at the Time of the De-
" ceafe of my ſaid Daughter: And if but One Daughter,
" then I deuize the ſaid Mefuages Lands and Premiſſes
" (without any Sale) to ſuch only Daughter and her Heirs
" for ever. But if in caſe my ſaid Daughter ſhall ſurvice
" all her ſaid Children by her ſaid preſent Husband, and the
" Heirs of ſuch Child or Children; then I give and deuize
" the ſaid Manors Mefuages Lands and Premiſſes, after the
" Deceafe of my ſaid Daughter, to my Brother William Lay-
" ton, for his natural Life: And after his Deceafe, I give
" and deuize the ſame to my Son in Law William Lowndes,
" his Heirs and Aſſigns for ever."

In December 1723, the Testator died, without altering or revoking his ſaid Will; leaving Elizabeth his Widow and the ſaid Margaret Lowndes his only Child and Heireſs at Law: And the ſaid Elizabeth his Widow, entered upon the Taid Manor Mefuages Hereditamens and Premiſſes ſo deuized to her for Life as aforesaid; and continued in Possession thereof until her Death, which happened in December 1757. Upon whose Death, the ſaid Margaret Lowndes, or the ſaid Defendant William Lowndes the Elder, her Husband, in her Right, entered upon the ſaid Premiſſes by Virtue of the ſaid Testator's Will.

Margaret Lowndes had Issue by the Defendant William Lowndes her ſaid Husband, born in the ſaid Testator's Lifetime, the Defendant William Lowndes Stone her Eldeſt Son; Layton Lowndes, her Second Son; Charles Lowndes, her Third Son; Richard Lowndes, her Fourth Son; the Plaintiff Henry Lowndes, her Fifth Son; and Thomas, born after the ſaid Testator's Deceafe.

Layton, Charles, and Richard Lowndes ſeverally departed this Life in the Life-time of their ſaid Mother; and the ſaid Layton and Charles died unmarried and without Issue: And the ſaid Richard Lowndes left Issue two Sons, the ſaid Plaintiff William Lowndes the Younger, and Richard Lowndes, Infants; and no other Issue.

The

The said *Margaret Lowndes* departed this Life 2d *March* 1764; leaving the said *William Lowndes Stone* the Defendant, and the Plaintiff *Henry Lowndes* and *Thomas Lowndes* her only Sons; who, with the Plaintiff *William Lowndes* the Younger and *Richard Lowndes* (Sons of the said *Richard* deceased) were her only Male Issue her surviving.

Upon this Case, the general Question submitted to the Court is—"Whether the Plaintiff is intitled to recover, " upon either, and which of the Two Demises."

This Case was argued on *Monday* last, by Mr. *Morton* for the Plaintiff, and Mr. *Caldecott* for the Defendants.

Mr. *Morton* urged, that the Testator's Intention was, to provide for the Children of his Daughter: But he never meant that her Eldest Son should take so long as there was Issue of any of her other Sons. His view was, "That his own Estate should never be confounded with that of his Son-in-Law *William Lowndes* the Elder." He never meant to give it to *Layton Lowndes* and his Heirs Male and Female; and for Want of such Issue, to such other Son of his said Daughter *Margaret*, as should happen to be her second Son at the Time of her Death.

The Words—"and for Want of such Issue, to such other Son of my said Daughter *Margaret*"—ought to be rejected in Favour of the Testator's Intention.

The Grandfather is living, in an advanced Age, and is desirous of having the Opinion of the Court, that he may dispose of his Estate amongst his Grandchildren accordingly.

Mr. *Caldecott* argued for the Defendant *William Lowndes Stone*, the Heir at Law; viz. Eldest Son of *Margaret*, the Testator's only Child.

He said that neither *William* the Issue of *Richard*, nor *Henry* who was the second Son at the Time of the Death of the Mother, can have any Right.

Margaret did not die seised under the Devise; but by the Event of the Right in Fee being devolved upon her as Heir at Law to her Father.

After the Devise to *Layton Lowndes* and his Heirs Male and Female, the next Words are—"And for Want of such Issue, to such other Son of my said Daughter *Margaret*—If

" If my Grandson Layton Lowndes should live and be the eldest, then to such Son who shall be the second Son of her Body living at the Time of her Decease ; and if but One living at the Time of her Decease, then to such only surviving Son and his Heirs for ever." So that there is no certain Description of the Person who is to take : And therefore it is void. *Cro. Eliz. 742. Taylor and his Wife v. Sayer.*
" Where a Devise is uncertain it is void."

Or if you suppose that the Sentence is incomplete, the Devise is equally void. *Butler and Baker's Case, 3 Co. 25.*

Then taking it in Connexion with the Words, " If my Grandson Layton Lowndes shall live, and be the Eldest ;" it is a Condition precedent, and never took Effect. Besides, the Devise is, " then to such Son who shall be the Second Son :" Whereas *William* the Son of *Richard* is *Grandson, not a Son.* And his Father could not take ; because he was not alive at the Death of his Mother : Which was a Requisite expressed in the Devise ; " living at the Time of her Decease." Nor could *Henry*, her fifth Son take, when there was Issue living of *Richard* her fourth Son.

He cited 2 *Peere Williams* 143. *Beaumont v. Fell* ; for the Sake of a Case which the Master of the Rolls there mentioned, (a Case taken from *Swinburne* 389.) " That where a Man intends to give a Legacy to *J. S.* and he gives the same to *J. N.* there neither *J. S.* nor *J. N.* shall take the Legacy ; for as much as *J. N.* is not the Person intended, and *J. S.* is not the Person named."

Mr. Morton, in his Reply, said that the Words " Such other Son of my Daughter *Margaret*" may be taken to mean " such other Issue" of his Daughter.

Lord MANSFIELD- We'll think of it. The Meaning of the Testator was to form another Family. He meant to exclude the Eldest ; and to give Estates in Succession to the other Sons, exclusive of the Eldest : His Intention is plain.

CUR'. advisare vult.

Lord MANSFIELD now delivered their Opinion : Which was to the Effect following.

We are all of One Opinion, with Regard to the Construction of this Will. It is very imperfectly drawn : And the material Words in many Parts are totally omitted.

PART IV. VOL. IV.

Y

It

It is plain what the Testator means : He meant to give the Estate to his second Grandson *Layton Lowndes* and his Issue, in the first Instance ; and, in Case of Failure of *Layton's* Issue, to such of his other Grandsons as should happen to be the Second Son of his Daughter *Margaret*, by Mr. *Lowndes*, at the Time of her Death, and to their Issue, in Tail ; and in Case of Failure of all their Issue, then according to the subsequent Limitations mentioned in his Will.

He meant to make a new Family in the then second Son, or whoever should afterwards become the second Son of his Daughter by her Husband.

Though this was manifestly his *Intention*, I was extremely afraid that there were not *Words* now to warrant Us to put this Construction upon it.

But I think there are *Words* sufficient to justify a Construction agreeable to the Intention of the Testator.

The first Limitation is to *Layton Lowndes*, in Tail ; then to such other Son as might be the second Son of *Margaret*, living at the Time of her Decease. The subsequent Limitation is upon a Contingency which has not happened ; viz. *Layton Lowndes's* becoming the Eldest Son in *Margaret's* Lifetime ; which he never did.

The last Limitation implies an *Estate Tail* in the second Son of *Margaret*, and those that should become so at her Death, successively. Then he goes on—“ And if his Daughter should survive all her Children by her then Husband, “ and the Heirs of such Children,” then he gives it over.

Therefore the former Limitations to the second Son of his Daughter *Margaret* must also be construed to have been an *Estate-Tail*.

Consequently, All the Sons, except the Eldest, are to take successively in Tail. It is immaterial whether Tail Male or Tail General : It is enough, that they take an *Estate Tail*.

The Judgment must be for the Plaintiff.

RULE, accordingly,

That JUDGMENT be entered for the PLAINTIFF.

Abrahams,

Abrahams, qui tam, *versus* Bunn.

Wednesday
22d June,
1768.

THIS was an Action for an usurious Contract, tried before Lord Mansfield, at Guildhall; and a Verdict found for the Plaintiff. Upon which, a Motion had been made, on the Part of the Defendant, for a new Trial; and a Rule granted to shew Cause.

The Motion was founded upon the Incompetency of the Plaintiff's Witness.

The Name of the Witness was *Benjamin Abrahams*. He was the *Borrower* of the Money; and was called, on the Part of the Plaintiff, to prove the usurious Contract. He was sworn in Chief; and examined, and cross-examined, before he was objected to.

He proved the Defendant to be a Pawnbroker; and that he had pledged several Jewels with him, on several Loans; some of which were redeemed: And he owned that this *Pledge had been returned*, on the Money borrowed upon it being paid. The Contract was proved by him to be usurious: And he proved it as it was charged in the Declaration.

At the Trial, after this Man had given his *whole Evidence*, it was objected that he could not be a *competent Witness*, unless the *Repayment* of the Money was proved; and that he himself was not competent to prove the *Repayment* of it.

After this Case had been fully argued at the Bar.—

THE COURT having taken Time to advise—

Lord MANSFIELD now delivered their Opinion.

This was a Motion for a new Trial; because *Benjamin Abrahams*, said to be an *incompetent Witness*, was examined, and his Evidence left to the Jury.

It was a *qui tam* Action upon the Statute against Usury. All the Counts charge "that the Defendant took accepted " and received from *Benjamin Abrahams*, the Sum of so " much, by Way of corrupt Bargain and Loan, for his " forbearing and giving Time of Payment from such a Day " to such a Day, of the Sum actually lent."

There was no Count as to any Bond, Assurance, or Contract, whereupon or whereby Usury was reserved or taken.

At the Trial, *Benjamin Abrahams* was examined for the Plaintiff; and swore that the Defendant was a Pawnbroker; that he borrowed from the Defendant several Sums of Money, (specifying the Times and Sums) upon Pawns, (specifying them and their Value,) which were always more than double the Value of the Money advanced.

He swore to his having redeemed the Pawns, (specifying the Times; and that the Defendant, before he would deliver the Pawns, took and insisted upon the Sums mentioned in the Declaration, over and above the Principal; which the Witness paid together with the Principal, and received back his Pawns.

He proved no Bond or Assurance or Contract for Usury, at the Time of the Loan: or for repaying the Money: Nor was any such additional Security necessary: because the Pawn which was double the Value of the Debt, was the Security, and was sufficient to pay it, unless redeemed.

He was cross-examined: And after he had given his *whole* Evidence, he was objected to as incompetent, (from what he had himself said, without any Evidence whatsoever on the Part of the Defendant,) because the *Re-payment* of the Money lent was not proved by *some body else*.

In Strictness, the Objection came too late; after he had been sworn in Chief; examined, and cross-examined.

The Strictness of Law, in this Respect, is very wise, and ought to be more adhered to: For the Relaxation may be abused, and must always occasion Waste of Time.

But I did not take it upon this Foot " of the Objection's coming too late." I considered the Objection as if it had been regularly made before he was examined in Chief, and as if the Whole of his Evidence had come out upon the *Voir dire*: And in giving our Opinion now, we consider it upon the *mere Merits* of the Objection, supposing it duly and regularly made.

There is no Case relative to the Borrower's Competence to be a Witness upon a penal Information against the Usurer, wherein either the Pleadings are stated, or the Facts of the Case stated, or any Argument by Counsel or the Bench reported.

There

There is no Case where the Question ever came before any Court in *Westminster-Hall*, except in *Smith's Case*, *Tr. 8. Jac. 1.* in *C. B.* upon a Trial at Bar. *2 Ro. Abr. 685.* Title "Trial," Letter G. pl. 2. *Co. Litt. 6. b.* and many other Books.

Two Reasons are there given for universally rejecting the Testimony of the Borrower: 1st. Because 'tis to be presumed really his own Cause, and that the nominal Plaintiff is set up colourably by him; 2dly. Because it would enable him to avoid his own Securities, and discharge himself of the Money borrowed.

The first Reason is now totally exploded: For, he is not now presumed to be the Plaintiff in the Cause.

As to the second—The Proposition laid down is too large. For, there may be Usury which cannot affect the Debt, or avoid the Contract. The Clause that avoids the Contract, is where the Contract is more than Five per Cent*. But if a Contract be for only Five per Cent; and the Lender afterwards takes more, he is liable to be prosecuted for Usury, and to pay the Penalty, though it does not avoid the Contract. And where it would affect the Debt, it may have been *paid.

* V. Long's
Cafe, Sir T.

All the other Cases are loose Notes of Sayings, or Opini-Raym. 191.
ons at *Nisi prius*; general Assertions, general Inferences,
without Particulars, without Argument, without Considera-
tion, without any State of Pleadings or Facts.

This Question being now come before the Court, it is necessary to consider it with Accuracy and Precision.

The Objection to the Competence of the Witness can only be supported by arguing, either "that the Event of this pe-
" "nal Prosecution in Favour of the Plaintiff will avoid the
" Bond Assurance or Contract of the Witness, and discharge
" him from the Debt;" or, "that this Cause turns upon
" the same Points and Transactions which, if proved in another
" Cause, would avoid the same."

The Foundation fails in both Propositions: And the Con-
sequence would not follow in the last, if the Premises were
true.

No Contract or Assurance appears here, for Usury; or so much as to repay the Money. And if there was, the Recovery of the Penalty upon this Information would not affect the Contract. The Judgment in this Action could not be given

given in Evidence in an Action for the Debt ; though the Validity of the Contract depended upon the same Grounds as the Information. That might indeed be a Prejudice, Influence or Bias upon the Mind of the Witness, and go to his Credit ; but not an actual Interest to go to his Competence.

This Distinction has not been sufficiently attended to, at *Nisi prius* : The Cases are contradictory ; and it is impossible to reconcile them.

* 1 Salk.

283.

† 2 Str.

1043.

The great Deference to Lord Chief Justice Holt's Opinion made the Case of *The King v. Whiting**, to be followed for some Time : Nay, Lord Hardwicke implicitly followed it in that of *The King v. Nunez* † P. 9 G. 2.

At that Time there were many Cases both Ways ; a String of both Sorts ; (and amongst the Rest, *Watt's* Case, in *Harden's* 331, 332. " that in Forgery, Perjury, or Usury, the Party grieved shall not be admitted as a Witness, because he may receive a consequential Advantage from the Verdict ; and *Parri's* Case, in *1 Ventris* 49. where such a Witness was admitted :) None of which Cases were considered or looked into.

‡ First moved, on 26th Oct. But since the Case of *Whiting* and the Case of *Nunez*, there has been great Light thrown upon the Distinction between INTEREST, which affects the Competence of a Witness ; and INFLUENCE, which goes only to his Credit. There Term 1736. have been the Arguments and Judgment in the Case of *Rex v. Bray*, Mayor of *Tintagel* ‡, where Lord Hardwicke shook Friday 11th the Authority of *Rex v. Whiting* ; which he there, in Effect, February 1736. contradicts, (though with guarded Decency of Expression,) notwithstanding his having before followed it in the Case of *Lord Hardwicke's Nunez*.

Words were (as I took them in my Note) " If that Case was strictly examined, I believe it would appear that the Objection in that Case went rather to the Credit than to the Competency of the Witness."

S.N.B. This Then came the Case of *The East India Company v. Goffens*. Case was There was also a Case of *Bailie v. Wilson*, (about the Proof very fully of a Will,) before the Delegates : Who were equally divided ; and the opinion of all " or Credit of the only Witness who proved the Codicil, sub- the Judges sequent to a second Will, setting up again the first Will ;" taken. Lord and therefore no Sentence was given. Thereupon a Chief Justice Lee Commission of Adjuncts issued ; A Majority of whom (Mr. held the Ob- jection to go to the Competency : So did Mr. Justice Denison. But Lord Chief Justice Willes, Lord Chief Baron Parker, Reynolds, Abney, Burnet and Wright ; " that it went to the CREDIT only." A new Trial was therefore ordered, on Friday 13th May 1743, Tr. 16 & 17 G. 2.

Justice

Justice *Denison*, being one) held “ that it went only to the “ Credit :” And Sentence was given for the first Will. Upon a Petition for a Commission to review, it was fully argued : And Lord *Hardwicke*, on 15 Jan. 1744, gave a solemn Opinion with the Majority of the Adjuncts, “ That the Witness “ having administered under the first Will as Agent to the “ Executor, or as Executor *de son Tort*, and being liable to “ Actions, the Objection went only to the *Credit*, not to “ the Competency.”

The solemn Discussion in these Three Cases drew the Line between INTEREST, which goes to the Competence ; and INFLUENCE, which goes to the Credit, more clearly than had before been understood.

It established a Rule, “ that where the Matter was *doubtful* “ the Objection should go to the CREDIT.”

It established, “ that the Question in a Criminal Prosecution being the same with a Civil Cause in which the Witness was interested, went generally to the Credit : unless “ the Judgment in the Prosecution where he was a Witness “ could be given in Evidence in the Cause where he was interested.” I say “ generally ;” (because all Rules of Evidence admit of Exceptions.)

After these Cases, in that of *Rex v. Broughton* in 1745*, *2Str.1229.
Lord Chief Justice *Lee* over-ruled the Three Cases of *Rex v. Whiting* †, *Rex v. Nunez* ‡, and *Rex v. Ellis* || : Which Opinion of his has been followed since, and approved. †1Salk.283. ||2Str.1043. ||2Str.1104.

There has been a remarkable Case since I left the Bar, in Trinity Term 32 & 33 G. 2. *Bartlett v. Pickersgill*. The Defendant bought an Estate for the Plaintiff : There was no Writing, nor was any Part of the Money paid by the Plaintiff. The Defendant articed in his own Name, and refused to convey ; and by his Answer denied any Trust. Parol Evidence was rejected : And the Bill was dismissed. The Defendant was afterwards indicted for Perjury ; tried at York ; and convicted upon Evidence of the Plaintiff, confirmed by Circumstances and the Defendant’s Declarations. The Plaintiff then petitioned for a supplemental Bill in Nature of a Bill of Review ; stating this Conviction : But the Petition was dismissed, because the Conviction was not Evidence, 22d November 1762.

This Reasoning shews too, that, if it was necessary, the Witness was competent to be heard, as to the Debt being paid : The Recovery could not be Evidence. What he swore could not be Evidence in an Action for the Debt.

There

There is no Danger of Perjury, from hearing him. The Defendant may produce the Security, and falsify him. If (as here) it is the Case of a Pawn, the Witness would swear against his own Interest to say untruly, "the Debt was paid, " and the Pledge returned." But, either Way, the Debt is paid : For, unless the Pledge be redeemed, it is a Satisfaction.

Suppose a Witness produces a Bond or Note or Mortgage cancelled—Suppose he produces a Receipt—There can be no Danger in hearing him: For, the Jury are not bound to believe him. That depends on Circumstances, which may contradict or support his Testimony.

But if it be necessary to prove Payment, and the Party is not to be heard as a Witness to prove such Payment, the Statute would be as effectually repealed as if the Borrower could never be a Witness at All: For, they never would suffer any Body else to be privy to the Payment, delivering up, or cancelling the Securities.

But to go further—All Objections to the Competence of the Witness must either be *proved*, or drawn from him upon a *Voir dire*; or to take it in the utmost Latitude, upon his *Examination*.

Here was no Proof of any Objection; or of any Doubt remaining. The Witness swore, "that he should neither gain " nor lose by the Event of the Cause;" in every Shape in which the Question could be put : And he shews it, by giving an Account of the Debt being paid. He swore, upon a *Voir dire*, "that it was paid."

Had the Defendant produced a Security, or proved the Pledge to be remaining in his Custody; it would have been a different Consideration, "Whether the Witness, who was the Borrower of the Money, could be examined to contradict " this." But when the whole Ground of the Objection comes from himself only, what he says must be taken together, as he says it: And then the Debt is paid.

In every Light, We are All of Opinion "that, under all " the Circumstances of this Case, BENJAMIN ABRAHAMS " was a competent Witness:" And consequently the Rule ought to be discharged.

RULE DISCHARGED.

The End of Trinity Term, 1768, 8 G. 3.

Michaelmas Term

9 Geo. 3. B. R. 1768.

Rex *versus* Praed, or Rex *versus* Edwards.

Tuesday
8th Nov.
1768.

(The St. Ives Causes.)

A Criminal Motion was put off, till the Validity of a Rate should be tried in a feigned Issue, "Whether it was an equal, or a partial one." And a Verdict having passed for the Defendant upon such Issue,

Mr. Solicitor-General (*Dunning*) moved, and was seconded by Sir *Fletcher Norton*, for a new Trial; the Verdict having been given contrary to Evidence.

But the COURT were clear against granting a new Trial; because it was within the *same Reason* as if it had been in a criminal Prosecution. For, as this Issue was directed in order to know "Whether this was an illegal and partial Rate;" and if it had been found to be partial, the Consequence would have been either an Attachement or an Information; It was just the same Thing as if it had been a Verdict found for the Defendant upon an Information: And if it had been upon an Information, the Court would not have set aside the Verdict and granted a new Trial, although the Acquittal had been contrary to the Weight of the Evidence.

However, it was agreed that when the original Motion should come on again, it would be open to any other Objection to the Legality of the Rate; only taking it for a Fact, "that it was not a partial one."

Matson

Tuesday
25 Nov.
1768.

Matson versus Scobel.

THIS was an Action brought for taking the *Ramsgate-Duty*, of a ship which passed the Harbour on the North-East Side of the *Godwin-Sands*, and not through the Downs.

There was a verdict for the Plaintiff, subject to the Opinion of the Court.

The Question was—“Whether, upon the Construction of the Act of 22 G. 2. c. 40. the Duty was payable, or ‘not, by a Vessel passing on the North-East Side of the Goodwin-Sands, and not through the Downs.’”

The COURT were very clearly of Opinion for the Plaintiff, “that the Duty was *not payable*.” There is no Reason in the present Case, for his being charged with it. He has no Equivalent.

The Duty is payable for the Advantages received. But this Ship received no Benefit from the Harbour.

They looked upon the fourth Clause, imposing the same Rates and Duties upon *Foreign Ships* passing through or being detained in the Downs, as upon Ships cleared out or entered into any of the *British Ports*, “because they would receive the same Benefit as *British Ships*,” to be decisive.

Per Cur'. unanimously—

Let the POSTEA be delivered to the PLAINTIFF.

Tuesday
22d Nov.
1768.

Stevens Esq. versus Duffty.

THIS was an Action of *Trover* for Three Horses, Three Mares, and Three Geldings; founded upon the Statute of 7 G. 3. c. 40. intitled “An Act to explain and amend and reduce into One Act of Parliament the general Laws now in being for regulating the Turnpike Roads of this Kingdom, and for other Purposes therein mentioned.”

It came on to be tried before Mr. Baron Perrott, at the last *Summer-Assizes* for the County of *Devon*. It appeared in Evidence that a Four-wheeled Waggon, of which the Defendant was then the Owner, having the Fellies of the Wheels of less Breadth than Nine Inches, *viz.* Three Inches and

and no more, upon 1st March 1768, did pass and was drawn with Seven Horses of the Defendant's on a Turnpike-Road in Little Torrington in the said County, being a Road within an Act of 3 G. 3. "for repairing, widening, and keeping in " Repair several Roads leading from the Town of Barnstaple in the County of Devon*."

* Cap. 35.

The said Waggon was loaded with ONE Piece of Timber only, which the Defendant was conveying from Huish the Place of his Residence, and where the Timber was felled, to Ware Gifford: And Huish is distant from Ware Gifford about Nine Miles; of which, Two Miles and Half are over the said Turnpike-Road.

The Plaintiff, on the 12th of the same Month of March, caused Notice in Writing to be given to the Defendant in the following Words—" To Mr. John Duffy—Take Notice " that I shall bring an Action against you, to recover the Sum " of 20s. and Three of your Horses forfeited by drawing your " Four-wheeled Waggon or Carriage having the Fellies of " the Wheels of less Breadth than Nine Inches, with Seven " Horses, on Barnstaple Turnpike-Road in the County " of Devon on the 1st Day of March Instant, contrary " to an Act made in the seventh Year of His Majesty's " Reign intitled &c, (repeating the Title of the Act verba- " tim.) Dated the 12th Day of March 1768, Henry Ste- " vens." And upon the 24th of the said Month of March, " sued out the *Latitat* for this Cause.

The Jury found a Verdict for the Plaintiff, with 20s. Damages; subject to the Opinion of this Court—" Whether " the Plaintiffs can maintain or recover in this Action."

It was now argued by Mr. Mansfield for the Plaintiffs, and Mr. Serjeant Burland for the Defendant.

Three Objections were made—First—That Drawing a single Piece of Timber, on a Turnpike-Road, with more than Four Horses, is not prohibited †.

† Vide 7
G. 3. c. 40.
§ 23. and

vide 7 G. 3. c. 42. § 40, which excepts out of the Regulations of that latter Act, all Carriages employed only in carrying any one Piece of Timber.

2d. That the Notice was not sufficient. 3d. That this Action is not the proper Method of recovering the Penalty, which consists of Two Parts; One, pecuniary: the Other, a specific Forfeiture of the Horses.

Lord MANSFIELD said it was hard, to be obliged to change Wheels or Carriages as the Piece of Timber should come to a Turnpike-Road upon which it was to proceed but a short

a short Space. Yet the Parliament have *not* made any Provision for this, or for only crossing Turnpike-Roads; though they have had it several Times under their Consideration. This is the principal Point in the Case.

It is admitted, that there is no Exception of a single Piece of Timber, out of the Turnpike Acts.

As to the other two Objections—There is no Difficulty.

1st. The Plaintiff might bring an Action of Debt for the Penalty, or of Trover for the Horses, if there was no Provision. But the Act provides that there shall be but one Recovery. The Plaintiff therefore waves the Penalty, and proceeds for the Horses.

2d. The Notice is *full* enough. The Act does not require it to be more particular.

POSTEA to be delivered to the PLAINTIFF.

Saturday 26th Nov. 1768.
Rex *versus* Breton Esq. Mayor, and Jeyes, Gent.
Town-Clerk of Northampton.

THIS Case now came on, in the Crown Paper, on a Demurrer to a special Plea to an Information in Nature of *Quo Warranto*, to shew by what Authority the Defendants claim the Liberty Privilege and Franchise of Admitting Persons to be Freemen of the Town of Northampton, who had not any previous Title to it, by Birth, Servitude, or Election.

The Court had some difficulty, at first, about granting an information of this Kind; and ordered a Search for Precedents: Upon which Search, the following were found.

Hil. 10 W. 3. Rex v. Mayor Aldermen and Commonalty of the Borough of Hertford—To shew “by what Warrant they “claim to have and use divers Liberties and Privileges with-“in the said Borough.”

Pasch. 11 W. 3. Idem v. Eosdem—It was referred to Sir Samuel Astley, to examine the Process issued against the Defendants.

Mich 11 W. 3. Idem v. Eosdem—Ordered that unless Cause be shewn to the Contrary, on &c. the several Issues returned upon

upon the several Writs of *Distringas* against the Defendants be estreated into the Exchequer.

Afterwards, in the same Term, the above Rule was discharged, upon hearing the Master's Report.

Pasc. 11 W. 3.—A Rule was made upon *T. Warburton* Esq. late Mayor of *Holt* in *Denbighshire*, to shew Cause why an Information should not be exhibited against him, to shew by what Warrant he claimed the Privilege “*to elect and jure Peregrinos & Extraneos anglicè Foreigners to be Burgeses of the said Borough, without the Consent of the Bailiffs and Burgeses of the Borough.*”

Trin. 11 W. 3.—The above Rule was made absolute.

Mich. 11 W. 3. Rex v. Warburton—A *Supersedeas* was ordered to the Writ of Attachment upon that Information *quia erronice emanavit*: And All further Process upon the said Information was ordered to be stayed, until the Court should be further moved on the Part of the Prosecutor.

Hil. 7 Ann.—It was ordered that an Information in the Nature of a *Quo Warranto* should be exhibited against *Alexander John*, to shew by what Warrant he claims the Liberty and Privilege “*to remove Capital Burgeses of the Borough of Leftwich in Cornwall, and to choose others in their Places ad libitum suum proprium.*”

Pasc. 3 G. 2.—A Rule was made upon *William Pole*, one of the Bailiffs of *Liverpool*, and upon *Richard Norris* and others, Twenty-two of the Common Council of the said Borough, to shew Cause why an Information in the Nature of a *Quo Warranto* should not be exhibited against them, to shew “*by what Warrant They, without the Mayor, and not being Twenty-five of the Common Council of the said Town, claim to have use and enjoy the Liberty Privilege and Franchise of electing approving and admitting Persons to be Burgeses of the aforesaid Town.*”

Which Rule, after several Enlargements, was in *Mich. 4 G. 2.* made absolute.

And in *Pasc. 4 G. 2.*—Rules were given, to plead to an Information which had then been accordingly exhibited against them: And a Plea of *Disclaimer* was entered.

In Mich. 32 G. 2—An Information in the Nature of a *Quo Warranto* was ordered to be exhibited against *Thomas Lewis*, Clerk, to shew by what Authority He claimed “ to make and swear free Burgeses of the Borough of New Radnor, without the Concurrence of the Bailiff Aldermen and Capital Burgeses of the said Borough.”

And an Information was exhibited against him accordingly.

On these Precedents,

The Court granted the Information.

It was settled by an eminent Hand ; and was to the following Effect—

Trinity Term 8 G. 3 Northamptonshire—to wit—Be it remembered &c. &c. That the Town of Northampton is an ancient Town ; and that the Mayor Aldermen and Burgeses of it now are, and for Thirty Years now last past and upwards, have been One Body Corporate and Politic &c, by the Name of the Mayor Bailiffs and Burgeses of the Town of Northampton ; And that within the said Town of Northampton, for and during the whole Time aforesaid, there have been and ought to be a Mayor Two Bailiffs Eight Aldermen and Forty eight Burgeses, who have been and are, and have been and are called “ The Company of Eight and Forty, of the said Town,” and an indefinite Number of Freemen of the said Town ; And that the Place or Office of a Freeman of the said Town is a Place or Office of great Trust and Pre-eminence within the said Town, touching the Rule and Government of the said Town and the Administration of Public Justice within the said Town ; And that the Mayor and Bailiffs of the said Town for the Time being, and such other Burgeses of the said Town as have been Mayors or Bailiffs of the said Town, and the Company of Eight and Forty for the Time being, during all the Time aforesaid have been and are the Common Council of the said Town ; And that the Mayor and Bailiffs of the said Town for the Time being, and such other Burgeses of the said Town as have been Mayors or Bailiffs of the said Town, and the said Company of Eight and Forty for the Time being, or the major Part of them in Common Council assembled, have elected and ought to elect such and so many fit Persons to be Freemen of the said Town as to Them hath seemed meet ; And that no Person ought to be admitted a Freeman of the said Town UNLESS elected thereto in Manner aforesaid, or intitled to be a Freeman of the said Town by Birth or Servitude, according to the Custom of said Town. THEN the Information charges, THAT *Thomas Breton* of the said Town Esq. (being Mayor of the said Town)

Town,) and *John Jeyes* of the said Town, Gentleman (being *Town Clerk* of the said Town,) on 10th November 8 G. 3. did use and exercise, and from thence until the Time of the Exhibiting of this Information have there used and exercised, and still do use and exercise, without any legal Warrant, Royal Grant, or Right whatsoever, the *Liberty Privilege* and *Franchise* of ADMITTING Persons FREEMEN of the said Town, who had not nor have any PREVIOUS TITLE to be Freemen of the said Town, by Birth Servitude or Election; And for and during all the Time last aforesaid, have there claimed, and still do there claim, without any legal Warrant, Royal Grant, or Right whatsoever, the *Liberty and Privilege* and *Franchise* of ADMITTING PERSONS to be FREEMEN of the said Town of Northampton, who had not nor have any PREVIOUS TITLE thereto by Birth Servitude or Election; And during the Time aforesaid, have, without any legal Warrant, Royal Grant, or Right whatsoever, ADMITTED divers Persons, to wit One hundred and Fifty Persons (whose Names are at present unknown to the said Coroner and Attorney) FREEMEN of the said Town; Which said Persons or any of them HAD NOT ANY PREVIOUS TITLE thereto by Birth Servitude or Election: Which said Liberty Privilege and Franchise they the said *Thomas Breton* and *John Jeyes*, for and during all the Time last abovementioned, upon our said Lord the present King, without any legal Warrant Royal Grant or Right whatsoever, have usurped and still do usurp &c, &c. Whereupon &c, to answer &c, and shew by what Authority they claim to have use and enjoy the Liberty aforesaid.

To this Information the Defendants plead—THAT the Town of Northampton is an ancient Town, that the Mayor Aldermen and Burgeses of it are and for Thirty Years past and upwards have been a Body Corporate and Politic; and that within the said Town, for and during the whole Time aforesaid, there have been and ought to be a Mayor, Two Bailiffs, Eight Aldermen, and Forty-eight Burgeses, who have been and are called “The Company of Forty-eight of the said Town,” and an indefinite Number of Freemen of the said Town; AND that the Mayor and Bailiffs of the said Town for the Time being, and such other Burgeses of the said Town as have been Mayors or Bailiffs of the said Town, and the said Company of Forty-eight, for the Time being, during all the Time aforesaid, have been and are the Common Council of the said Town, (as by the Information is supposed.) But the said *Thomas Breton* and *John Jeyes* further say, That the said Town of Northampton now is, and from Time whereof the Memory of Man is not to the contrary hath been, an ancient Town; and that the Burgeses of the said Town, at the Time of making the Letters Patents hereafter mentioned, to wit, the 3d of August 15 C. 2. and from Time whereof the

Memory

Memory of Man then was not to the contrary, had been, One Body Corporate and Politic, in Deed Fact and Name ; And that within the said Town and Borough there then was, and from Time whereof the Memory of Man was not to the contrary had been, and from thenceforth hitherto hath been, a certain Officer called a *Mayor* of the said Town, and a certain other Officer called the *Town-Clerk* of the said Town. And the said *Breton* and *Jeyes* further say, that King *Charles* the Second by his Letters Patent, dated 3d *August 15 Regni*, granted, that the Town of *Northampton* should be a free Town of itself ; And that the Burgesses and their Successors should be one Body Politic and Corporate, by the Name of the Mayor Bailiffs and Burgesses of the Town of *Northampton* ; and that there should be a *Mayor*, and Two *Bailiffs* ; and Forty-eight of the Commonalty, who should be called “ *The Company of Forty-eight* ;” And that the aforesaid *Mayor* and Two *Bailiffs* and *such other Burgesses* of the same Town who formerly had been or thereafter from Time to Time should be *Mayors* or *Bailiffs* of the same Town, together with the aforesaid Forty-eight Burgesses called “ *The Company of Forty-eight*,” should be and be called “ *The Common Council* of the Town “ aforesaid ;” and should be from Time to Time assisting and aiding to the *Maycr* of the said Town for the Time being in all Cases and Matters touching or concerning the Town aforesaid. And the said late King further willed, and by the same Letters Patent granted to the aforesaid *Mayor* *Bailiffs* and *Burgesses* of the aforesaid Town of *Northampton* and their Successors, That the *Mayor* and *Bailiffs* of the Town aforesaid for the Time being, and *such Burgesses* of the same Town which theretofore had been, or thereafter from Time to Time should be, *Mayors* or *Bailiffs* of the same Town, together with the aforesaid other *Burgesses* called “ *The Company of Forty-eight*,” and their Successors for the Time being, or the major Part of them, (of which major Part, the late King willed that the *Mayor* of the Town aforesaid for the Time being, and *such Three other Burgesses* of the Town aforesaid, which theretofore had been or thereafter should be *Mayors*, commonly called *Aldermen* of the same Town, should be One,) should have full Power and Authority to constitute ordain and make, from Time to Time, such *REASONABLE Laws Statutes and Ordinances* *whatsoever*, which to Them, according to their *sound Discretion* (as aforesaid) should seem to be *good and wholesome, profitable, honest*, and *necessary* for the good Rule and Government of the said *Burgesses* *Artificers* and *Inhabitants* of the Town aforesaid for the Time being ; And for a Declaration, in what Manner and Order the aforesaid *Mayor* *Bailiffs* and *Burgesses*, and the *Artificers* and *Inhabitants* and *Residents* of the Town aforesaid, for the Time being, should have demean and use themselves in their Offices Charges and Employments

ments within the Town aforesaid and the Limits of the same; and for the further Good and public Service Government and Bettering of the said Town, and victualling of the same; and for levying of Monies to the Use and Behoof of the said late King, his Heirs and Successors, or to the necessary Uses of the same Town; And also for the better Preservation Government Disposing Letting and Setting of Lands Tenements Possessions Rents Revenues and Hereditaments to the aforesaid Mayor Bailiffs and Burgesses and their Successors given granted assigned or confirmed, or thereafter to be given granted or assigned; and for Accounts Matters and other Causes whatsoever touching or any way concerning the Town aforesaid, or the State Right and Interest of the same Town; as by the same Letters Patent, among other Things, may more fully appear: Which same Letters Patent, afterwards, to wit on the said 3d Day of *August* in the said Fifteenth Year of the Reign of the said late King *Charles the Second* at the Town of *Northampton* aforesaid, the then Mayor Bailiffs and Burgesses of the Town of *Northampton* aforesaid accepted and agreed to. And the said *Thomas Breton* and *John Jeyes* further say, That the **MAJOR** and **TOWN-CLERK** of the said Town of *Northampton* for the Time being, from Time whereof the Memory of Man is not to the Contrary, have admitted and have used and been accustomed to admit, and during all the Time aforesaid of Right OUGHT to have admitted to the FREEDOM of the said Town of *Northampton*, ALL Persons having a Right to be admitted to the same; whether by reason of *Pirth* or *Servitude*, or by Virtue of any Order or Orders of the said Mayor Bailiffs and Burgesses, or in any other Manner howsoever; to wit, at the Town of *Northampton* aforesaid. And the said *Thomas Breton* and *John Jeyes* further say, That on the 22d Day of *October* in the Year of our Lord 1767, the then Mayor and Bailiffs and the major Part of such of the then Burgesses of the said Town who theretofore had been Mayors or Bailiffs of the same Town, and the other then Burgesses of the same Town called "The Company of Forty-eight,"(whereof the then Mayor and three other Burgesses of the same Town, Each of whom had theretofore been Mayors of the same Town, were Four,) did, in due Manner, meet and assemble themselves at the *Guildhall* within the said Town, in order to consult compose constitute ordain make and establish such **BYE-LAWS STATUTES ORDINANCES** and **CONSTITUTIONS**, as to them should seem good wholesome profitable honest and necessary, according to their sound Discretion, for the better Rule and Government of the said Town of *Northampton*: And being then and there so met and assembled as aforesaid, for the Purposes aforesaid, They the said then Mayor Bailiffs and Burgesses of the said Town of *Northampton* did then and there in due Manner compose constitute ordain make and establish a certain good wholesome profitable honest and necessary **ORDINANCE OR BYE-**

BYE-LAW, to wit.—“ That ANY Person or Persons (*not being entitled to the Freedom of the said Town by Birth or Servitude*) should be *thereafter ADMITTED to the Freedom of the said Town, UPON PAYMENT of the Price or Sum of TEN POUNDS*; Except such Person or Persons who had married or should be married (at the Time of their Admission) to the Daughter of a Freeman of the said Town; And *Those, upon payment of the Price or Sum of Five Pounds*; with the usual and accustomed Fees; Provided that upon every such their Admission they should respectively pay for the same, in *Cash* as aforesaid; and that no Note or other Security should be taken as a Consideration for such Freedom :”—As by the said Ordinance or Bye-Law, Relation being thereunto had, may more fully appear. Which said Ordinance or Bye-Law hath ever since the Making thereof hitherto been and ought to have been constantly observed and kept by the Mayor Bailiffs and Burgesses of the said Town of Northampton: And the same Ordinance or Bye-Law is still in full Force and Virtue, not in the least annulled abrogated or repealed. And BY VIRTUE of the said Ordinance or Bye-Law, the said Thomas Breton, being Mayor, and the said John Jeyes, being Town-Clerk, of the said Town of Northampton for and during all the Time laid and mentioned in the said Information in that behalf, at the said Town of Northampton in the County of Northampton aforesaid, have used and exercised and still do use and exercise the Liberty Privilege and Franchise of admitting Persons PAYING SUCH SUMS OF MONEY as by the said Bye-Law directed, to be FREEMEN of the said Town, *who had not nor have any PREVIOUS TITLE to be Freemen of the said Town, by Birth Servitude or Election*; and for and during all the same Time have there claimed, and still do there claim, the Liberty Privilege and Franchise of admitting Persons PAYING SUCH SUMS OF MONEY as by the said Bye-Law directed, to be Freemen of the said Town of Northampton; *who had not nor have any PREVIOUS TITLE thereto, by Birth Servitude or Election*; as it was and still is lawful for them to do. WITHOUT this, “ That no Person ought to be admitted a Free-man of the said Town, unless elected thereto in such Manner as in the said Information is mentioned, or intitled to be a Freeman of the said Town by Birth or Servitude;” as by the said Information is supposed: And also WITHOUT this, “ That they the said Thomas Breton and John Jeyes the said Liberty Privilege and Franchise in the said Information abovementioned, upon our said Lord the present King have usurped and do usurp, in Manner and Form as in and by the said Information is alledged against them.” All and singular which said Matters and Things they the said Thomas Breton and John Jeyes are ready to verify as the Court shall award. Wherefore they pray Judgment; and that the said Liberty Privilege

Privilege and Franchise, so by them claimed in Form aforesaid, may be allowed and adjudged to them ; and that they may be dismissed and discharged, by the Court, hereof, and from the Premisses above charged upon them.

To this Plea the King's Coroner and Attorney *demurs*, generally ; and prays Judgment against the Defendants ; and that they may be convicted and forejudged.

The Defendants *join in Demurrer*.

Mr. WALLACE, for the Prosecutor, objected that this Bye-Law, " That any Person, not intitled to the Freedom either by Birth or Servitude, should be admitted to the Freedom upon Payment of a certain Price or Sum of Money," was a *bad One*.

Mr. ASHURST, *contra*, for the Defendants, argued that it is a good and valid One.

The COURT were clearly of Opinion, " That this Bye-Law was an Alteration of the Constitution given by the Crown ; and void."

ACCORDINGLY—

Per Cur'. unanimously—

JUDGMENT for the KING.

Dickson *versus* Fisher.

Monday
28th Nov.

THIS was an Action of Debt, upon the Statute of 2 1768.
G. 2. c. 24. " For the more effectual preventing Bribery and Corruption in the Elections of Members to serve in Parliament."

The Defendant pleaded the general Issue.

Upon the Trial (at the last Summer Assizes for *Essex*,) the Plaintiff gave in Evidence the Writ which issued to the Sheriff of the County of *Essex*, with his Return indorsed : To this was annexed the Indenture of Return between the Mayor and Commonalty of the Borough of *Colchester* of the one Part ; and the said Sheriff, of the other Part.

He also gave in Evidence the *Precept* issued by the said Sheriff to the Returning Officer for the Borough of *Colchester*, disannexed and separate from the said Writ and Indenture.

Upon the Face of the Precept, the Words “*and Commonalty*” appeared to have been inserted; and though struck through with a Pen, yet remained legible.

It appeared further in Evidence, that the Precept was originally annexed to, and returned with the Writ and Indenture to the Sheriff; but was not filed, with the same, in the Crown-Office.

The Defendant offered *parol* Evidence, by the Mayor, to shew that the said Words “*and Commonalty*” were in the Precept, and no wise obliterated, when the same was delivered to the said Mayor, and when it was returned by Him to the Sheriff annexed to the said Indenture.

The QUESTIONS stated for the Opinion of the Court were—

1st. Whether the Instruments above stated, and given in Evidence by the Plaintiff, *sufficiently prove and support the Declaration*; viz. “That the Precept, in the Declaration mentioned, issued, directed to the Mayor of Colchester.”

2dly. Whether the above *Parol-Evidence* that the Words “*and Commonalty*” were not obliterated, when the Precept issued from the Sheriff and was delivered to the said Mayor, and when it was returned by Him to the Sheriff, was *admissible*, and ought to have been received.

It came on to be argued on *Tuesday* last (the 22d Instant) by Mr. Serjeant *Leigh* for the Plaintiff, and Mr. *Harvey* for the Defendant.

Mr. Serjeant *Leigh*—The Precept was the *best* and the *only* Evidence whereby We could prove our Averment “that the Precept issued.”

They could not bring *Parol-Evidence* against the *Record*. The Record must be averred, as it stands upon the Face of it: And, as it stands, it is directed “to the Mayor of the Borough of Colchester.”

But if it should be admitted that the Words “*and Commonalty*” are, in Fact, not obliterated; yet, it is a Precept directed to the *Mayor*: And no other Person has any Thing to do with it. By the express Direction of the Statute of 7 & 8 W. 3. c. 25. § 1.—the Precept is to be delivered to “the proper Officer of every Borough &c; and to no other Person whatsoever.”

Therefore

Therefore the additional Words "and Commonalty" would be *nugatory*.

Mr. Harvey, contra—This is an Action upon a very penal Act of Parliament; the *Particeps Criminis* is admitted as Evidence; and it is a hard Verdict: Therefore we may reasonably insist upon every Thing that we can object to.

The Plaintiff sets forth, That the Sheriff issued his Precept directed "to the Mayor of Colchester." The Precept produced in Evidence is directed "To the Mayor and Com-
monalty." This is quite another Precept; and does not support the Declaration.

By 7 & 8 W. 3. c. 25. the Precept is to be * directed to *V. Sect. 1.
the Corporate Body; though it is to be delivered to the Re- † By 23 H.
turning Officer. And the constant Practice is so † 6.c. 15. § 1.
The Pre-
cepts are to
be directed
"through the Words and Commonalty; but that they still " Mayor
"remain legible."
" and Bai-
"liff; or
"Bailiffs or
"Bailiff,"
where there
is no Mayor.

They ought to have shewn by parol Evidence, "that there
"was an Obligation, prior to the Delivery. This they did
not do.

On the contrary, I offered the parol Evidence of the Mayor, "that there was no Obliteration at all, when the Precept was delivered to Him." And this was a mere Matter of Fact collateral to the Record. It was only to shew what the Record was. They ought to have offered parol Evidence, to prove it: And we ought not to have been refused to give Evidence "that the Precept produced by them was not the true Record."

This is a material Variation in the Direction of the Precept. Of which, 2 Salk. 660. *Queen v. Dr. Drake*, is a Proof: Where, in setting forth a Sentence of the Libel, it was recited with the Word "nor" instead of "not;" but the Sense was not altered thereby; and yet it was holden a fatal Variance. The present Variation is much greater than that. The Record ought to have been set forth exactly as it is. In 6 Mod. 167. *Queen v. Carter*, which was an Indictment for Perjury, a slight Variation in reciting a Record was a good Objection.

The Words stand legible in the Record produced in Evidence; and make a fatal Variance from the Declaration.

Mr.

Mr. Serjeant *Leigb*, in Reply, denied it to be a *hard* Verdict; and said that the Cases cited do not apply to *this* Case.

The *Direction* of the Precept should be to the Returning Officer, who is to do the *Acts* thereby required.

The Question stated shews that the Words were *obliterated* at the *Time of the Trial*.

We were to form our Declaration upon the Precept as it stands: We are *not* to account for the *Alteration*. We were only to produce the Precept, to shew that it is *as we have declared*. And it now stands directed *as it ought to be*.

Lord MANSFIELD—These Precepts ought to be directed to the Returning Officer. The Plaintiff searches the Office, and finds it with this Alteration or Correction. These Words were put in by Mistake: They are therefore struck out. They would be Surplusage, if they stood there. It is the same as if they had never been in. The Precept ought to be directed to the Returning Officer: And the Practice is so. Therefore as the Plaintiff has produced the Precept, no parol Evidence ought to be received, to make it erroneous.

The REST of the COURT concurred.

Per Cur. unanimously—

Let the POSTEA be delivered to the PLAINTIFF.

But it was delayed for Two Days, upon Mr. *Harvey's* desiring to have an Opportunity of moving for a new Trial: which he could not do, by the Practice of the Court, without laying a *special Ground* for such a Motion. He suggested, that he had Reason to apprehend that the Judge who tried the Cause was of Opinion against the Verdict.

On Friday last, the 25th Instant, Cause was shewn why the Defendant should *not* be at Liberty to move for a new Trial.

The Cause shewn was, That by a general Rule of the Court, no new Trial can be moved for, after the first Four fitting Days, (*i. e.* Sundays excluded) of the Term; unless *special Leave* be asked and obtained, for this Purpose.

And the Counsel for the Plaintiff relied on this established Practice of the Court. There was no Reason, they said, to take

take *this* Case out of the common Rule : no special Ground laid, to induce the Court to depart from it : It was the mere *Laches* of the Attorney.

N. B. The Affidavit of the Attorney (*Mr. Ward*) was no more than that he was not at first instructed about it ; and when he was so, he did not apprehend that he was precluded from moving for a new Trial after the Four Days were expired.

Lord MANSFIELD—The great Ground of the Motion is a Suggestion “that Mr. *Harvey* has Reason to apprehend that Mr. Baron *Smythe*, who tried the Cause, is of Opinion against the Verdict.” If that is so, there seems to be Reason for their being let in to apply now, for what we should have granted if they had applied in Time.

Mr. Justice *YATES* added another Reason for it ; *viz.* That in Order to come at Justice, the Court might relax their own Rule ; since the Attorney might consider the Matter as still depending, till the Case was argued. And he observed, that this is a Sort of Criminal Case, attended with heavy Consequences.

ADJOURNED till Mr. Baron *Smythe*'s Report should be obtained.

Mr. Justice *WILLES* now communicated the Baron's Report: Which specified the Evidence, and did not express any Dissatisfaction with the Verdict.

Lord MANSFIELD—This was a Motion for Liberty to move for a new Trial, though the Four Days were elapsed, which are by the Rule and Practice of the Court limited for making Motions of that Sort. It has been objected, “that no such Motion can be made after that limited Time ; as no Leave was given for it.” But IF there appear, under the particular Circumstances of the Case, sufficient Grounds to us, to excuse the Delay ; and that, to attain Justice, there ought to be a new Trial ; we may make an Exception to the general Rule of Practice. And therefore we desired (amongst other material Circumstances) to have the Judge's Report of the Evidence. The Judge does not declare any Dissatisfaction at the Verdict. He certifies the Particulars of the Evidence ; and that the Jury gave their Verdict upon believing a Witness for the Plaintiff, though he was contradicted by some of the Defendant's Witnesses. The Jury had a Right to judge of the Credit of the Witness : It was their proper Province.

Province. There does not appear to be sufficient Reason to set aside this Verdict and direct a new Trial. Therefore the Rule must be discharged.

RULE DISCHARGED.

Rex versus Inhabitants of Stanlake.

See this *Case* in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 192. Page 627.

Rex versus Inhabitants of Notton.

See this *Case* in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 193. Page 629.

Rex versus Inhabitants of Bitton.

See this *Case* in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 194. Page 631.

Rex versus Inhabitants of Garway.

See this *Case* in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 195. Page 632.

The End of Michaelmas Term 1768, 9 G. 3.

Hilary

Hilary Term

9 Geo. 3. B. R. 1769.

Grey versus Smithyes and One Other.

Thursday
26th Jan.
1769.

THIS was an Action on the Statute of 7 & 8 W. 3. c. 25. "for the further regulating Elections of Members to serve in Parliament, and for the preventing irregular Proceedings of Sheriffs and other Officers, in the electing and returning such Members."

The Cause of Action arose at an Election of Members of Parliament for the Borough of Colchester. It came on to be tried at the Assizes for the County of Essex: And the Plaintiff was non-suited, by the Opinion of the Judge who tried it:

The Declaration stated the Writ for the Election, and the Delivery of it to the Sheriff: and that the Sheriff, by Virtue of it, made a Precept to the Mayor of Colchester, who was the proper Officer; and delivered it to him; and that the Mayor indorsed the Day of his Receipt thereof in his Presence; and forthwith caused public Notice to be given of the Time and Place of Election; and proceeded to Election thereupon within Four Days after his Receipt of the Precept &c.

On the Precept being produced, it appeared that it was delivered to the Mayor, in the Presence of Two SUBSCRIBING Witnesses who attested such Delivery of it to him: But this Proof was not offered to be made by either of Themselves, but by a third Person.

The Objection to this Evidence was "That the Proof offered, of his Delivery of the Precept to the Mayor, was not by the Evidence of EITHER of those two subscribing Witnesses, but by another Person." And upon this Objection,

jection, Mr. Justice Bathurst nonsuited the Plaintiff. Whereupon, the Plaintiff moved for a new Trial; and the Judge made his Report: Which it is not necessary to particularize. The latter Part of it stated the Objection.

Upon shewing Cause against a new Trial, on Thursday the 24th of November 1768 —

Sir Fletcher Norton and Mr. Cole, on behalf of the Plaintiff, agreed that if it was necessary to prove the Indorsement, it ought to have been proved by the *instrumental* Witness; But they denied that it was at all NECESSARY to prove the Indorsement. All that was necessary to be proved was the Right to choose Members; the Writ being delivered to the Sheriff; the Delivery of the Precept to the Returning Officer; and the going to an Election thereupon.

Mr. Morton, *contra*, for the Defendant —

The Plaintiff ought to prove "that there was a good Election had:" And the Delivery of the Precept to the proper Returning Officer, is a necessary Step towards a good Election. Therefore it ought to be properly proved.

* Vide 7 & 8 W. 3. c. 7. The Precept was a Record. By 23 H. 6. c. 15. §. 1. It is to be returned to the Sheriff by Indentures: And by a subsequent Statute, the Return is to be filed in the Petty Bag Office*. The Precept, being annexed to the Indenture, is a Record, and must be proved as a Record. But this Precept was taken off from the Indenture; and thereby became only an Instrument, not a Record. This Instrument therefore ought to be proved as an Instrument. And this Instrument having a *subscribing* Witness to the Delivery of it to the Clerk of the Crown in Chancery, Mayor, it ought to have been proved by this *subscribing* Witness, as being the best Evidence that could be had.

Therefore, as it was a Requisite to this Election "that the Precept should be delivered to the Mayor;" and also "that such Delivery be properly proved;" and here are Two *subscribing* Witnesses to this Delivery; the Delivery ought to have been proved by One at least, of the *subscribing* Witnesses: For want of which, the Plaintiff was properly nonsuited.

The Court took Time to advise.

Lord MANSFIELD hinted, that the Attestation of the Witnesses relates to the Time of the Precept's being delivered to

to the Returning Officer. But the *Time* of such Delivery is not, in *this Case*, necessary to be proved.

CUR' *advisare.*

On Saturday 26th of the same November 1768, Lord Mansfield delivered the Opinion of the Court.

The latter Part of Mr. Justice Bathurst's Report was
“ That as neither of the Persons, who attested the Indorse-
“ ment of the Day the Mayor received it, was called, He
“ thought there should be a Nonsuit against the Plaintiff.”

Upon this, the Counsel acquiesced, and proceeded no further. But that was only Decency: By which, they ought not to suffer. It is always decent for the Counsel to acquiesce in the Opinion of the Judge, at the Trial: But it is not reasonable that the Parties should be bound down by it, if that Opinion be wrong.

Though this is an unfavourable Case, and the Bribe so low*; yet this comes before the Court as a *general Rule of Evidence*: And if the Court should agree with Mr. Justice half a Gu-
*It was only a Guide.
Bathurst, it would be always necessary to prove the Time of nea.
the Delivery of the Precept.

The Question agitated before him was “ Whether the De-
“ livery of the Precept to the Mayor was necessary to be au-
“ thenticated by the Witnesses who had *subscribed* their
“ Names in Attestation of such Delivery.”

We ALL think, that if it had been the Case of the Mayor himself, such an Attestation of the *Time* of the Delivery of the Precept to him and of his indorsing it in the Prefence of the Person who delivered it to him, might be material: And the Rule “ of the *instrumental* Witnesses being the proper Witnesses to prove a Fact which they have attested, (as “ being the best and properest,) may hold, as far as relates to the Defence of the Mayor himself, in Case of his being put to justify his own Conduct.

But the present Case is not the Case of the Mayor himself: It is on a *collateral* Question, and concerns a THIRD Person, to whom the Indorsement made by the Mayor is *immaterial*.

The Clause in the Act of 7 & 8 W. 3. c. 25 t. inflicts a + Vide sect. Penalty on the Mayor's omitting to indorse the Day of re. 6. giving the Precept: And it is material to *Him*. But this
tibid

third Person can not know when it was indorsed, how it was indorsed, or when it was attested. Therefore this Difficulty of proving these Circumstances ought not to be laid on a *third Person.*

A Proof of the Corporation's Right to choose Members ; and of the Precept's issuing, as declared upon ; and of the Delivery of it to the Returning Officer ; and of the going to an Election thereupon ; might be enough for the Plaintiff in this Action, to make : And it does not appear that he would have been deficient in making all proper Proof. But all *further* Proof that he could have made, was *lost* by this Opinion of the Judge holding the Necessity of proving this Delivery of the Precept to the Mayor, *BY THE INSTRUMENTAL WITNESSES WHO ATTESTED THE DELIVERY*, or by One of them.

Therefore we are ALL of Opinion, that the Non-suit was too early in the Cause ; and that there ought to be a new Trial.

RULE for new Trial made ABSOLUTE.

On the Monday the 28th of November 1768, Lord Mansfield said that Mr. Justice Bathurst apprehended that the Court had mistaken his Report.

Therefore let the Rule be enlarged till the next Term : that we may have Mr. Justice Bathurst's additional Report.

His Lordship intimated to Mr. Cole, of Counsel for the Plaintiff, to wait upon Mr. Justice Bathurst, and refresh his Memory ; if there was any Doubt about the Facts that happened at the Trial.

RULE ENLARGED.

Mr Cole now reported from Mr. Justice Bathurst, " that " he was satisfied."

Whereupon—

Lord MANSFIELD—The Consequence of that is, " that the former Rule must stand."

Mayor

Mayor of Norwich *versus* Berry, One, &c. Friday 27th
Jan. 1769.

THE Judgment in this Case was pronounced in *Trinity*
Term 1767 : [v. ante, p. 2109. 2116.] The Defendant
died in October 1767.

Mr. *Ashurst* had obtained a Rule for the Plaintiff to shew
Cause why the Judgment should not be entered up as of *Trinity*
Term 1767, the Time when it was pronounced. (See
6 Mod. 59. 60. Lord *Mobun's* Case, and the same Book 191.
Hodges v. Templar.)

Mr. *Wallace* was for the Plaintiff, and opposed the Rule.

But the COURT thought it a very reasonable One :
And Lord *Mansfield* mentioned the Case of *Tooker v. Duke of*
Beaufort, Hil. 30 G. 2. (which see in Vol. 1. p. 147, 148.)

RULE made ABSOLUTE.

Vide 17 C. 2. c. 8. and 8 & 9 W. 3. c. 11. The former
(sect. 1.) relates to the Death of either Party between Verdict
and Judgment : The latter (sect. 6.) relates to the Death of
either Party after an interlocutory Judgment and before final
Judgment.

Rex *versus* Nathaniel Dawes, Esq. Mayor of Wednesday
Winchelsea. 1st Februa-
ry, 1769.

SIR *Fletcher Norton* had moved (on Tuesday 22d November
1768,) to set aside a Judgment of *Ouster*, which had
been lately signed against the Defendant in this Cause, by
Default.

He did not move it on behalf of the Defendant ; but upon
the Foot of his *Collusion* with Prosecutor.

Sir *Fletcher's* Clients, on whose behalf he made this Motion,
were Eight Corporators, whose Rights were dependant upon
the Right of *Dawes* to be Mayor ; which Right of his they
therefore desired to defend.

Mr. *Dawes* had gone through his Office of Mayor, with-
out any Impeachment, till this Information in Nature of a

Quo

Quo Warranto was brought against him. He refused to defend it, and insisted upon suffering Judgment to go against him by Default; although an unexceptionable Indemnification was offered to him from these Persons, whose Corporate Rights depended upon his having a Right to the Office of Mayor.

Sir Fletcher produced Affidavits to prove that the Mayor neither had been nor was to be at any Expence in defending his Right to the Mayoralty: Notwithstanding which, he had discharged his Attorney from acting any further on his behalf, under a Pretence that being now doubtful about the Validity of his Title to the Office of Mayor, he had determined not to be at any *further* Expence in defending it; though, in Fact, he never had been at any Expence at all, but his Expences had been undertaken to be paid, and some of them actually paid by other Persons. Immediate Notice was thereupon given to Mr. Dawes, "that he should be *indemnified* from all Charges and Expences which he might incur by making his Defence:" Which he nevertheless refused, and suffered this Judgment of *Ouster* to be signed against him, for Want of it.

Sir Fletcher Norton now offered to give him any Indemnification against any Expence attending his carrying on his Defence.

The COURT thought the Motion reasonable; and made a RULE upon both the Prosecutor and the Defendant Dawes, for them to shew Cause why the Judgment of *Ouster* signed against the Defendant should not be set aside; and also why Thomas Orby Hunter Esq. a Freeman of the ancient Town of Winchelsea should not be admitted to defend, in the Name of and for the said Defendant; he the said Thomas Orby Hunter indemnifying the said Defendant from all Costs and Charges attending such Defence occasioned thereby.

UPON shewing Cause against this Rule, many Facts were disputed; and particularly, "whether Mr. Dawes had given up his Claim *collusively*, or not." But it appeared sufficiently, upon the Whole, That the Rights of these Corporators, whose Corporate Rights turned upon the Validity or Invalidity of Mr. Dawes's Title to the Mayoralty, during which they were elected into their Offices, would be greatly affected by the Support or Desertion of his Title to the Office of Mayor.

This Matter bore a long and warm Litigation: After which, and upon all the Circumstances of the Case.

The whole COURT were clear, that the Corporation had such an Interest in the Mayor's Title to his Office, and such

such a Connexion with it, and such a Right to see it supported, if it was really a good One, that he ought not (as an honest Man, or as a just Corporator,) to desert and give it up, in prejudice to the Rights of the Corporation in general, or of particular Corporators, when he was offered a complete indisputable Indemnification on the Part of those who desired to defend his Right in order to support their own. Under these Circumstances, they held that it was not in his Power to give it up.

They did not indeed think him obliged to maintain his own Right at his *own Expence*, merely to support the Rights of those who claimed under it; if he either really thought his Title unsupportable, or found that the maintaining of it would be too expensive for him to bear: But they were very clear, that he ought not to be permitted to desert it, either *collusively or voluntarily*, when those whose Rights depended upon it were desirous of maintaining it, *without any Charge or Expence to him*. Therefore,

Per Cur' unanimously—

RULE made ABSOLUTE.

Rex versus Uriah Corden.

Saturd. 4th
Feb. 1769.

THIS was a Conviction by a Justice of Peace, upon the third Section of the Act of 5 G. 3. c. 14. "for the more effectual Preservation of Fish in Fishponds and other Waters."

It set forth that on a specified Day, at a specified Place, *Marija Buxton* of the Parish of *Ashborne* in the County of Derby Spinster cometh in her own proper Person before the Justice, and upon her Corporal Oath &c &c giveth me the said Justice to understand and be informed that *Uriah Corden* of *Clifton* in the Parish of *Ashborne* in the said County Gentleman, on the 18th Day of June last past, in the Parish of *Ashborne* aforesaid, did fish with a Net in a Brook or Stream called the *Schoo Brook*, in that Part of the said Brook which runneth between the Manor of *Clifton* and the Manor of *Off-coat* and *Underwood* in the said County; and did then and there take kill and destroy several Fish, against the Form of the Statute in such Case made and provided; he the said *Uriah Corden* * not having any just Right or Claim to take * See the kill or carry away such Fish; and the said Part of the said *Brook* or *Stream* wherein and whereupon the said Fish were so taken killed and carried away not being in any Park or Paddock, or in any Garden Orchard or Yard adjoining or belonging to any Dwelling-house, but in other inclosed Ground then

then and there being private Property. And further, on the same Day and Year aforesaid, and at the Place aforesaid, cometh One *John Chatterton* of *Ashborne* aforesaid Gentleman, and giveth me the said Justice to understand that *Richard Hayne* of *Ashborne* aforesaid Esq; is the true and lawful Owner of the Fishery of the aforesaid Part of the said Brook called *Schoo Brook* which runneth between the Manor of *Clifton* and the Manor of *Offiate* and *Underwood* in the County aforesaid. And thereupon the said *Martha Buxton*, the Informant aforesaid, prays that the said *Uriah Corden* may be convicted of the Offence aforesaid, according to the Form of the Statute in such Case lately made and provided. WHEREUPON, afterwards, to wit upon the 16th Day of July in the Year aforesaid, at *Ashborne* aforesaid in the County aforesaid, he the said *Uriah Corden* being by Virtue of my Warrant brought before me the Justice aforesaid at *Ashborne* aforesaid to answer the said Charge contained in the said Information, and having heard the same, he the said *Uriah Corden* is asked by me the said Justice " If he can say " any Thing for himself why he the said *Uriah Corden* should " not be convicted of the Premises above charged upon him " in Form aforesaid :" And because he the said *Uriah Corden* doth not nor can say any Thing in his own Defence touching and concerning the Premises aforesaid, but doth of his own Accord freely and voluntarily acknowledge and confess all and singular the said Premises to be true, in Manner and Form as the same are charged upon him in the said Information ; and because, all and singular the Premises being heard and fully understood by me the said Justice, it manifestly appears to me that he the said *Uriah Corden* is guilty of the above-mentioned Offence so laid to his Charge ; it is therefore ADJUDGED by me the said Justice, that he the said *Uriah Corden* is GUILTY of the aforesaid Offence ; and that he be, and he is hereby CONVICTED by me the Justice aforesaid, of the Premises aforesaid, according to the Form of the Statute aforesaid : and I the Justice aforesaid do award and adjudge, that for the Premises aforesaid he HATH FORFEITED the Sum of Five Pounds of lawful Money of Great-Britain, to be paid as the Statute aforesaid doth direct. IN WITNESS whereof, I the said Justice to this present Record of Conviction as aforesaid have set my Hand and Seal, at *Ashborne* aforesaid in the County aforesaid, the 16th Day of July in the Year above-written.

RICHARD BERESFORD. (L. S.)

This Case was twice argued by Council on both Sides.

The Counsel for the Defendant took Three Exceptions to the Conviction.

1st. Exception.

1st Exception. It don't appear that this Commission was made upon the Complaint of the Owner, or by Authority from the Owner; or even that this was a Fishing without the CONSENT of the Owner. Whereas it appears clearly, upon considering this whole Act of Parliament, and comparing one Part of it with another, that the Complaint of the Owner is essentially necessary to the Jurisdiction given to the Justice of Peace by this third Clause of it. See the Case of *The King against Mallinson*, M. 32 G. 2. B. R. *ante*, p. 681, 682.

2d Exception. There is no Proof upon Oath, that Mr. Hayne was the Owner; or who else was so. John Chatterton's Information is not upon Oath: And it is confined to the Time of giving it; but says nothing about who was Owner at the Time of the Fishing.

3d Exception. The Adjudication is "that the Defendant had forfeited the Sum of Five Pounds, to be paid as the Statute aforesaid hath directed." Whereas it ought to have particularly specified and directed to whom it should be paid.

It was answered to these Exceptions—

1st. There are no Expressions in this Act of 5 G. 3. c. 14. which require the Complaint to the Justice to be made by the Owner. The Words are general: The Jurisdiction is given to the Justice, "upon Complaint made to him upon Oath."

2d. The Defendant has confessed the whole Charge: And Part of it is, "that Mr. Hayne was the Owner."

3d. The Act itself directs "that the Party convicted shall immediately after Conviction pay the Penalty of Five Pounds to such Justice or Justices before whom he shall be convicted, for the Use of such Person or Persons as the same is thereby appointed to be forfeited and paid unto." It is enough, to say, "convictus est, et foris faciet the Sum of Money juxta formam Statutii." 1 Salk. 383. *Regina v. Barrett.* 2 Sir J. Strange 858. *Rex v. Hawks.*

The COURT All concurred in holding this Conviction to be a bad one. They thought that a * tight Hand ought to be holden over these summary Convictions; and it ought to appear to the Court, that the Justice has Jurisdiction in the Case: They ought to be kept to a proper Degree of * Strictness; and not to be made arbitrarily and without Authority. *Vide ante*, p. 613. accordingly.

pear to have Jurisdiction. Here is no Complaint from the Owner; nor does it even appear to have been without his Consent. It ought, at least, to appear that it was *without his Consent*. This is plainly implied in the Act of Parliament: 'he giving the Penalty to the Owner shews it. Here, it does not sufficiently appear that this was *private Property*; or who was the Owner. The Witness who gives the Justice to understand "that Mr. Hayne is the Owner," was *not upon Oath*; and was therefore no Witness. The Ownership is not sufficiently charged: Neither is it confessed. The Confession goes no further than the Matters charged. The Words in the Conviction "not having any just Right or Claim to take "kill or carry away any such Fish," are the Words and Opinion of *Martha Buxton*; not of the Justice of Peace who has made the Conviction: And they are too General. The Proviso from whence they are taken, means to except such Persons as have a special Right to fish in the Fishery of any other. The Offence intended in this Conviction is fishing in the Fishery of Mr. Hayne, being private Property. But all this might be done, for aught that appears upon this Conviction, with the *Consent* of the Owner. The Fact ought to appear so that the Court may be able to judge whether the Conviction be agreeable to Law. If the Owner had been the Complainor, that would have shewn his Dissent: But this Conviction is upon the Complaint of *Martha Buxton*; and it does not appear that the Defendant has been guilty of fishing in any Water being private Property, *without the Consent* of the Owner.

Per CUR'. unanimously—

CONVICTION QUASHED.

Rex *versus* John Fletcher.

Rex *versus* William Gould.

These were two Convictions exactly like the last above,
against *Uriah Corden*.

CONVICTIONS QUASHED.

Tonna,

Tonna, surviving Assignee of Hitchcock and Edwards, *versus* Adam Edwards.

Monday
6th Feb.
1769.

MR. Cox moved, on behalf of the Defendant, that he might be discharged on filing *Common Bail*. He moved it upon the Foot of the Plaintiff's Affidavit being insufficient to hold him to special Bail; for Want of being positive enough, as to the Existence of the Debt: For, that the Plaintiff had only sworn "that the Defendant was indebted to him in the Sum therein mentioned, AS APPEARS by the Bankrupt's Books, and as the Plaintiff verily believes."

Mr. Cox said, there was a Difference between the Case of Executors or Administrators and the Case of an Assignee under a Commission of Bankruptcy. The Latter might procure stronger Evidence than the Former: The Assignee might procure a positive Affidavit from the Bankrupt himself. An Assignee therefore ought to go further than merely swearing to the Bankrupt's Books and his own Belief.

Lord MANSFIELD answered, that it was not reasonable to put it upon the Assignee, to procure an Affidavit from the Bankrupt: The Bankrupt might perhaps refuse to make such an Affidavit. Besides, it has been solemnly settled, "that such an Affidavit as this, is sufficient." It is as certain as the Nature of the Thing will bear. In a Case between *Barclay and Others, Assignees of Styles and Styles*, against *Hunt*, in *Michaelmas Term 1766*, we took Time to look into the Cases and consider: And I gave the Resolution of the Court. [See this Case and Resolution, *ante*, p. 1992, to 1996. *M. 7 G. 3.*]

The whole COURT agreed it to be a settled Point, "that swearing to Belief, in this Manner, was sufficient for an Executor or Administrator, or an Assignee under a Commission of Bankruptcy."

MOTION DENIED.

Sutton *versus* Bishop.

THIS was an Action of Debt brought against *Bishop*, for the 50*l.* Penalty, upon the 7th Clause of the Statute of 2 G. 2. c. 24. "for the more effectual preventing Bribery and Corruption in the Election of Members to serve in Parliament:" To which Action the Defendant had

A a z pleaded

pleaded "*Nil debet* ;" and a Verdict had been obtained against him by the Plaintiff, at the last *Reading Assizes* ; but not fairly and regularly, as the Defendant alledged ; who therefore moved to set it aside.

This Case was particularly circumstanced, long debated, and largely discussed : But the short Substance of it was no more than this—

The Defendant *Bishop* received a Bribe of Five Guineas from One *James Earle*. He determined to discover *Earle*, in order to indemnify Himself, pursuant to the 7th Clause of this Statute, whereby it is enacted " that if any Person offending against this Act, within the Space of Twelve Months next after such Election as aforesaid, discover any other Person or Persons offending against this Act, so that such Person or Persons so discovered be thereupon convicted, such Person so discovering, and not having been before that Time convicted of any Offence against this Act, shall be indemnified and discharged from all Penalties and Disabilities which he shall then have incurred by any Offence against this Act." Accordingly, the now Defendant *Bishop* made this Discovery of *Earle*, upon the very Day of the Transaction, to Mr. *Gray*, an Attorney, who was a Commissioner to take Affidavits ; and at the same Time made an Affidavit of the Fact before Mr. *Gray*. This was done upon the 16th of *March* : And an Action was thereupon brought by One *Bingley* against this *James Earle*. The Writ against *Earle*, at the Suit of *Bingley*, was served upon *Earle* within Three Days, *viz.* on the 19th of *March*. Two Months after this, the present Action was brought by the present Plaintiff *Sutton*, against *Bishop*, the Receiver of the Bribe, who had Two Months before made the abovementioned Discovery. The Process against *Bishop*, at the Suit of *Sutton* was served upon *Bishop*, on the 18th of *May*. Both these Causes (*Bingley v. Earle*, and *Sutton v. Bishop*) were set down for Trial on the same Day ; and were actually tried within half an Hour of each other : But the Cause of *Sutton v. Bishop* standing first, and as first entered, upon the Judge's Paper of Causes, he would not invert the Order in which they stood upon his Paper, by trying the other Cause (*of Bingley v. Earle*) first, though that Action was first commenced. The Consequence was, that *Sutton* got a Verdict against *Bishop* : For, *Bishop* could not shew that he had made a Discovery of another Person so as to be thereupon *convicted*. *Bingley*, on the other Hand, got a Verdict against *Earle*, upon the Evidence of *Bishop*. But this Verdict came too late to avail *Bishop* in his own Cause at the Suit of *Sutton* : For, a Verdict had already been given against him ; which, as his Counsel insisted, could not have happened, if his Cause had been tried first, as it ought to have been.

In the Debate of this Matter, (upon Tuesday 24th January 1769,) Two Questions arose :

1st. Whether the Defendant *Bishop* was intitled to avail himself of the Protection of this seventh Clause of the Act above recited ;

2d. In what Mode he could avail himself of it; supposing him intitled to it.

The Counsel for the Plaintiff *Sutton* argued, that *Bishop* was not intitled to the Protection of this Clause. They said, he was only a *Witness* in the Cause; not Plaintiff: *Bingley*, the Plaintiff in the Action, was the Discoverer; and the only One who could take Benefit of this Provision in the Act. Besides, he can never be esteemed a *complete Discoverer*: He had not prosecuted up to *Conviction*, when the Verdict passed against him. At that time, there was no Verdict, much less any Judgment, against *Earle*: It is the Judgment, that renders it properly a Conviction. A subsequent Prosecution of *Earle* could not avail *Bishop*. It a Verdict alone is to be considered as a Conviction, and if a Witness may be esteemed a Discoverer, yet this Defendant *Bishop* would not be intitled to this Indemnification and Discharge, by giving his Evidence. For, the Clause says, "The Person discovering, not having been before that Time convicted of any Offence against the Act;" Whereas this Witness was convicted of such an Offence before the Time of giving his Evidence.

The Counsel for the Defendant *Bishop* argued, that their Client was undoubtedly such a Discoverer as the Act meant to protect; that a Witness may be considered as a Discoverer, and more properly than the Plaintiff in the Action; that a Verdict against the Person discovered, is a sufficient Conviction of him within the Intention of this Clause; that the Words "not having been before that Time convicted" manifestly refer to the Time of the original Discovery, when first made, and not to the Time of giving Evidence at the Trial; and that the Judge ought to have tried that Cause of *Bingley v. Earle* first, and then Evidence might have been given of the Verdict against *Earle*, upon the "Nil debet" pleaded in this Cause. The Defendant *Bishop* was clearly, they said, intitled to the Benefit of this Provision; and therefore he ought to have Liberty to avail himself of it in some Mode or other; by setting aside their Verdict and granting a new Trial, or by staying the Postea, or arresting the Judgment, or at least by an *Auditā Quere'a*.

The COURT took some Days to consider.

And on Monday 6th February 1769, they delivered their

*N.B. Lord Mansfield

did not interfere in this; not having been making an Affidavit of the Fact was the first and original Defendant at covery. They held, that in this Case, the Defendant *Bishop* was to be deemed the Discoverer. His Application to Mr. *Gray* and the Action was brought thereupon against *Earle*: And *Earle* was convicted, upon the Evidence of *Bishop*. The other Witnesses were only Supporters of his Discovery. The Clause in Question speaks of the Discoverer, in the singular Number. The Prosecutor could not be Evidence for himself. If no One but the Prosecutor could be considered as the Discoverer, the Clause would be ineffectual.

They held, that the Words "such Person so discovering, and not having been before that Time convicted of any Offence against this Act" clearly relate to the Time of the original Discovery: And therefore *Bishop's* having been himself convicted before he gave Evidence against *Earle* in the Cause last tried, is no Objection at all. The Grammar of the Sentence requires this Construction. The original Discovery is the true Merit. If the Offender substitutes another in his Place, so as to be convicted, that intitles him to be himself indemnified and discharged. If another Person institutes a Prosecution grounded upon such Discovery, the Discoverer is only a Witness in that Cause; he has no Power over the Conduct of it: But when a Conviction of the Person discovered is obtained, the End is then answered, and the Discovery is then rendered complete and perfect.

It was made a Question, in the Argument of this Case, "What shall amount to a Conviction, within the Sense of this Clause?" It was said "that a Verdict alone was not a Conviction." And they held, that in civil Actions, a Verdict is nothing without a Judgment. This is a civil Action; an Action of Debt for a Penalty: "*Nil debet*" is pleaded. Therefore they were of Opinion, that it ought to be completed by a Judgment. But they were also of Opinion, that after it should be so completed, it would relate back to the Time of the original Discovery. And they thought that *Bingley* ought to be at Liberty to enter up his Judgment; in order to intitle *Bishop* to his Indemnity, or at least not to strip him of it. They thought also that *Sutton* should complete his Judgment; but that his Proceeding upon it should be stayed.

They

They thought, upon the Whole, that *Bishop* was *intitled to some Relief*: But in *what Mode* he should receive it, was not easy to determine. The Verdict obtained against him could not be set aside for *Irregularity*; because it was *not irregular*. There was no Pretence to *arrest the Judgment*; because nothing appears upon the Face of the Record, to justify it: And the Court ought not to arrest Judgments upon Matters not appearing upon the Face of the Record: but are to judge upon the Record itself, that their Successors may know the Grounds of their Judgment. An *Audita Querela*, it was agreed, would be a proper Method, and the most unexceptionable One, and was the old legal Remedy: But as it had been long disused and would be expensive, they chose to do it, if it might be so done, in a *summary Way*, as being more easy and less expensive. At length, they were of Opinion, that it might be done by a *special Rule*, particularizing the Circumstances of the Case, and upon their staying the Execution of *Sutton's Judgment* against *Bishop*. This Rule, they said, would be a Record of the Court: And the special Reasons of making it would appear in it, and be upon Record.

For the present, They discharged a Rule at this Time subsisting, " for staying the *entering up* the Judgments in the respective Cross-Causes:" But they made a Rule "that all Proceedings upon both these Judgments should be stayed till further Order" And they proposed to make, afterwards, a special Rule to the Effect that has been above-mentioned.

Rex *versus* John Rowe.

Wednesday
8th Feb.
1769.

THIS was a Case reserved at the last *Essex-Assizes*, upon the Trial of an Information in Nature of a *Quo Warranto*. It was as follows: *Viz.*

This was an Information in the Nature of a *Quo Warranto* against the Defendant, to shew by what Authority he claims to be One of the Freemen or Sworn Burgesses of the Borough of *Colchester* in *Essex*: To which, the Defendant pleaded specially; and the King's Coroner having replied and denied the Allegations contained in the Plea; the following Issues were joined upon the Record; *viz.*

1st. That within the said Borough of *Colchester* there is not, nor at the Time of exhibiting the Information was not, nor during all the Time aforesaid whereof the Memory of Man is not to the contrary hath there been, a certain ancient and

and laudable CUSTOM there used and approved, that is to say, " That every Person who had served an Apprenticeship by Indenture, for the Term of Seven Years, to any FREE MAN or Sworn Burgess of the said Borough, hath been admitted and sworn, or hath used and been accustomed, nor of Right ought to be admitted and sworn (in Case he hath thought fit to make Application for that Purpose) into the Office of a Freeman or Sworn Burgess of the said Borough, to exercise the said Office for and during his natural Life."

2d. That the Defendant did not in due Manner SERVE an Apprenticeship for the Term of Seven Years unto one John Steward otherwise Stuart, of Colchester aforesaid, Bay and Say Weaver.

3d. That the Defendant was not in due Manner BOUND an Apprentice to the said John Steward otherwise Stuart, by Indenture, FOR AND DURING the said Term.

4th. That the said John Steward otherwise Stuart, at the Time when the said Defendant was so supposed to be bound an Apprentice to the said John Steward otherwise Stuart, and during the whole Time of the Service, was not One of the Freemen or Sworn Burgesses of the said Borough.

5th. That the Defendant did not become duly intitled to be admitted into the said Office of a Freeman or Sworn Burgess of the said Borough.

6th. That the Defendant did not in due Manner take his Corporal Oath for the due Execution of the said Office of a Freeman or Sworn Burgess of the Borough.

7th. That the Defendant was not duly admitted into the Office of a Freeman or Sworn Burgess of the said Borough.

8th. That the said Defendant was not nor is a Freeman or Sworn Burgess of the said Borough.—Prout a Copy of the Pleadings.

The CUSTOM set forth in the Defendant's Plea was ADMITTED. And it appeared in Evidence, that at or before the Feast of St. Michael the Archangel 1731, the Defendant went to live with John Steward otherwise Stuart in the Pleading mentioned, UPON LIKING, in order to his being bound an Apprentice, and continued to live with and serve his said Master in that Manner until the 24th of July 1732; WHEN he was bound an Apprentice to the said John Steward otherwise Stuart, by Indenture, for the Term of Seven Years, to commence from the Feast of St. Michael the Archangel 1731:

—Prout

—Prout the Indenture. That the said Defendant continued to live with and serve the said John Steward otherwise Stuart, as an Apprentice, under the said Indenture, FROM the said 24th of July 1732, until within about a Year and an half of the End of the Term in the said Indenture mentioned; when an INDORSEMENT was made on the said Indenture, in the following Words—“ I John Steuward let John Rowe to John Finch, for the Reasidue of his Time; to find him of all nesafary Things, during his Time, and at the End his Comings.” Signed “ John Finch, John Steward;” and witnessed “ John Clay; but not dated. That the said John Finch was NOT a Freeman of the said Borough of Colchester. That from the Time of making the said Indorsement, and in Pursuance thereof, the said Defendant lived with and served the sait JOHN FINCH, for the Remainder of the said Term in the said Indenture mentioned.

The CORPORATION-BOOKS were produced; and several Entries in the same read, of the Indentures of Apprenticeship of Joseph Godfrey, William Cook, Jacob Foliard, John Woodroffe, George May, George Bull, Robert Brown, and Abraham Bowers: and also the Entries of the said Persons having been admitted and sworn Burgesses of the said Borough.—Prout a Copy of the said Entries.

AND upon this, the Jury found a Verdict for the Defendant, on the first and fourth Issues: and for the King, upon all the other Issues; subject to the Opinion of the Court on the following Question—

“ WHETHER the Binding by Indenture, and Service for Seven Years, in the Manner before stated, are SUFFICIENT to intitle the Defendant to be admitted and sworn a Free Burgess of the said Borough of Colchester, under the Custom set forth in the Pleadings.”

And if the Court shall be of Opinion “ that the Defendant was intitled,” then a Verdict is to be entered for the Defendant upon all the Issues:

But if the Court shall be of Opinion “ that the Defendant was not intitled,” then a Verdict shall be entered for the Defendant upon the first and fourth Issues only, and for the King upon all the other Issues.

JOHN MORTON, for Defendant:
RICHARD LEIGH.

After

After this Case had been twice argued at the Bar, and discussed on the Bench,

The COURT thought that it ought to have been left to the Jury: But as it now stood, they were of Opinion that there should be a Repleader; and conceived that setting aside the Verdict, and granting a new Trial, with Liberty to amend the Pleadings, would be the best Method they could now put it into. Accordingly, they made the following Rule:

Verdict set aside, and a new Trial ordered, with Liberty for the Defendant to amend his Plea; upon Payment of Costs by the Defendant to the Prosecutor.

Thursday
9th Feb.
1769.

Rex *versus* Guardians of the Poor of the City of Canterbury.

SERJEANT Leigh shewed Cause why a MANDAMUS should not issue, directed to them, commanding them to assess every Inhabitant, Parson, Vicar and Others, and every Occupier of Lands, Tenements, Tithes impropriate, and Proprietary of Tithes, in the said City and the Parishes thereof, in EQUAL Proportion; for the Maintenance of the Poor in the said City and the Parishes thereof. [Vide 1 Geo. 2. Stat. 2. c. 20. sect. 20.]

Mr. Robinson, Mr. Ladd, and Mr. Newman were of the same Side.

Mr. Dunning (Solicitor-General) Sir Fletcher Norton, and Mr. Benson were of the other Side.

This Corporation for maintaining the Poor within the City of Canterbury was established by 1 G. 2. Stat. 2. c. 20. by the Name of "Guardians of the Poor of the City of Canterbury." This is a public ACT: And by the 36th Section, any Person aggrieved by any Rate may appeal to the next Quarter Sessions. The last Rate was made in November: And, though a Sessions had been holden since, it had not been appealed from.

AGAINST the Mandamus, it was said—That there is a Rate already subsisting, made in the same Manner as these Rates have usually been made ever since the Year 1730. That the Clergymen in Canterbury are the Persons who apply for this Mandamus, upon an Apprehension of two Grievances; One, "that they Themselves are over-rated;" the Other, "that other

" other Persons are not rated enough :" But their Affidavit only says " that there are Persons in the City, who have personal Estate and Stock in Trade ;" without specifying any particular Persons ; and " that there are many of the Inhabitants there, who carry on considerable Business there," without naming any particular Inhabitants or Species of Business.

But *personal Estate and Stock in Trade* are NOT RATEABLE to the Poor-Tax, by or under the 43 Eliz. c. 2. nor can they be rated to it at all. The present Rate is a fair and equal Rate, and not yet expended.

Personal Estate is not generally rated to the Poor, throughout the Kingdom ; and very seldom to the Land-Tax, unless upon a Re-assessment : And it is very difficult, or indeed scarce possible to rate it. In the Case of *The King* against *The Inhabitants of Shallfleet, Sherrington's Cafe*, H. 7 G. 3*. * See it A Superintendent of Salt-works was holden not rateable on ^{ante, p.} 2011 to Account of his Salary. ^{2015.}

Stock in Trade can not be rated. Lessees of Lead-mines are not, in that respect, liable to be rated to the Relief of the Poor: *Governor and Company for Smelting Lead, &c. v. Richardson, and Others*, M. 3 G. 3. (which *vid. ante, p. 1341* to 1345.) A Farmer is not rateable to the Poor, for his Stock: *Queen v. Inhabitants of Barkin*. 2 *Lord Raym.* 1280. It is there indeed said " that a Tradesman is rateable for his Stock in Trade :" But that was not the Point before the Court. ^{† And it has been since deter-}

It is true, that it should seem by the Case of *Shoreditch Parish*, in *Cartbaw* 164, Mich. 10 W. 3. " that personal Estates were then thought liable to be rated to the Relief of the Poor." But the Practice has been contrary since: And probably the old Notion was deserted from its being found impracticable. At least, the personal Estate mentioned in that Case must be understood to have been liquidated *ascertained* personal Property. ^{mined} ^{of The King v. Church-wardens and Overseers of Ringwood,}

As they have another subsisting Remedy, an Appeal to the Quarter-Sessions, the Court will not interfere by granting them a *Mandamus*. It was holden in *Dr. Butler's Cafe v. Cobbet*, vide post, p. ^{28 June 1775:} *Cafes Temp. Q. Ann. p. 254.* " that a Mandamus is not a proper Remedy for an unequal Taxation : But the proper Remedy is by Appeal." And in the Case of *The King and the Churchwardens of Weobly*, in 2 Str. 1269, the Court refused to grant a Mandamus directing the Insertion of particular Persons in the Poor's Rate : For that the Remedy was by Appeal; and this Court never went further than to oblige the making a Rate, without meddling with the Question " who " is

" is to be put in or left out;" of which the Parish Officers are the proper Judges, subject to an Appeal.

IN SUPPORT of the Rule, it was said— That the Sessions had refused to state the Matter specially: And therefore this Court would not preclude the Persons aggrieved, from this only remaining Method of Redress, by Mandamus. This Court will always take Care to see that delegated Powers are properly executed. If this really is a good Rate, it will appear so upon a Return to our Mandamus; and will be established as such. It is true, that this Court will not enter into the *Quantum* of the Rate and the exact Equality and Proportions of it amongst the several Individuals that are rated. But they will not permit the Omission of a *whole Class* of Persons who ought to have been rated. Now we have sworn and proved "that there are several Persons in the Place, who have personal Property and who have Stock in Trade there, and yet are omitted out of this Rate." They say, indeed, "that such a Sort of Property is *not rateable at all.*" But this is the very Question upon which we desire the Decision of the Court. We say that it *is* rateable; that it has been *always understood* to be rateable; that it actually *is and has been* rated, in many Places; that the Decisions in this Court have been "that it *ought* to be rated;" that the Cases they cite are no Authorities to the contrary; that many Persons vote for Members of Parliament (in Scot and Lot Boroughs) on Account of their being rated for their personal Property. We object to the Rate as being *radically wrong*: They ought to have rated *all Sorts* of rateable Property. On the contrary, they have left out one Part of the Property made rateable by the Statute. The Legislature have delegated the Power of providing for the Poor of the City of Canterbury in the precise Words of the 43 *Eliz. c. 2.* And our Rule is in the same Words with both. Every Inhabitant ought to be rated according to the visible Estate, both real and personal, which he has in the Place. 2 *Bulstrode* 354. And we say, that as we are rated for our Tithes, it is but just and equal that all other visible Estate, all other rateable Property, ought to have been rated likewise. In the Case of *Barkin*, 2 *Lord Raym.* 1280, 1281, the Rule is express "that a Tradesman is taxable to the Poor-Rates, for his Stock in Trade." And in the *Shoreditch* Case, the Sessions quashed the second Rate, because, though the personal Estates were named in it as well as the real, yet the personal Estates were not charged in proper Proportion to the Lands: And the Sessions-Order was confirmed by this Court. *Cartherw* 464.

But supposing it to be doubtful, that alone would be a sufficient Reason for granting a Mandamus. Let them return "that it is not rateable: And we will controvert their Return.

turn. We have a proper Ground for praying a Mandamus : We do not complain of any Thing that is merely Ground for an Appeal. If they had rated personal Property only, and omitted Land ; should not a Mandamus have gone ? And there is just as much Reason for it, when they have rated Land, omitting personal Property.

The Case of the Lessees of Lead-Mines was determined, they said, upon this Ground "that the Poor are to be supported by *certain*, not by *casual and uncertain* Funds." [V. *ante*, 1343.] But the same Reason holds for rating personal Property to the *Poor's Tax*, as to the *Land Tax*.

Lord MANSFIELD happened to be absent.

Mr. Justice YATES said that the general Question aimed at in the Argument of this Case does not seem to have been decisively determined : And if it were necessary for the Court to determine upon that Question now, he should desire to consider about it: But he did not think it necessary to determine that Point now ; because there were sufficient Reasons, exclusive of it, against making the present Rule absolute. The Court can't issue a Mandamus "to make an *equal Rate* :" It is within the Jurisdiction of the Justices of the Peace, to judge whether a Rate is equal, or whether proper Persons are put into it. If it be unequal, or if Persons who ought to be inserted are omitted, it is Matter of Appeal, and within the Jurisdiction of the Sessions. But the present Application is made to this Court *per Saltum* : The Rate was made in November ; a Quarter-Session has been holden since; and no Appeal made to it, from the Rate. Besides, it does not appear that the personal Estate and Stock in Trade are clear liquidated ascertained personal Estate and Stock in Trade. So that there was not, in his Opinion, a proper Foundation laid for granting this Rule.

Mr. Justice ASTON agreed with Mr. Justice Yates, that the Persons who complain of this Rate have done wrong, in coming to this Court *per Saltum*, without appealing to the Sessions.

He observed, that it was odd that ever since the Case in *Bulstrode* (which was above 140 Years ago,) the Rule said to be then settled should never have been carried into Execution, nor any Determination made in Pursuance of it. He thought there was great Difficulty and Guess-Work in taxing personal Property and Stock in Trade ; and that it was scarce practicable to ascertain the true *Quantum* of either. No Case decides "that it is rateable :" And probably the Statute of 33 Eliz. did not intend that it should be so.

However,

However he declared "that he gave no direct Opinion upon this Point."

Mr. Justice WILLES also declared, that he should give no *obiter* Opinion about personal Property or Stock in Trade being liable to be rated. Yet he intimated that long contrary Usage ought to go a great way towards overturning any old *Dictum*; and that if they were liable, they ought at least to be visible liquidated and ascertained, not loose fluctuating and uncertain.

He agreed with Mr. Justice *Yates* and Mr. Justice *Aston*, "that the proper Method to have been taken in this Case, would have been an *Appeal* to the Sessions;" Observing, at the same Time, that by 17 G. 2. c. 38. *sect. 4.* an Appeal is given to Persons who have any Objection to any Person being put on, "or left out of the Rate."

He added, that he did not know that this Court ever granted a Mandamus "to make an equal Rate."

Mr. Justice *Yates* thereupon repeated, and Sir *Fletcher Norton* agreed "that the Court could not grant a Mandamus to make an equal Rate."

The COURT explicitly declared, that they had given no Opinion "Whether personal Property and Stock in Trade were or were not rateable to the Poor-Tax."

They seemed to think that the fairest Method would be, for these Guardians of the Poor to state the Matter *specially*, that the Court might have certain Facts to judge upon.

At present, they discharged the Rule now depending.

RULE DISCHARGED.

Note—

* Vide post. p. On Saturday 26th May 1770, in the Case of *The * King against The Inhabitants of Witney*, the Question "Whether Stock in Trade was liable to be rated to the Poor-Tax," was again before the Court; and Lord Mansfield was then present; But the Case being imperfectly stated, the Court would not give a general Opinion, upon a vague State of the Case. I hope, hereafter to communicate this Case of *Witney*, at large: It may now be seen, in Mr. Bott's Collection of Decisions upon the Poor-Laws, *Case 52. pages 34. 35.*

But subsequent to this *Witney-Cafe*, there was another very like it, on 28th June 1775, *Rex v. Churchwardens and Overseers of Ringwood*; in which it seems to be very nearly, if not quite settled, “that a Tradesman is not ‘rateable to the Poor-Tax, for his Stock in Trade.’” This Cafe I also hope to give some Account of, hereafter †; unless I shall find the Profession to be gorged † Videopost, with the Number of Cafes that I have already troubled P. them with.

Rex versus Dr. Hay, on the Application of Love-grove.

Friday,
10th Feb.
1769.

MR. Dunning (Solicitor General) shewed Cause against a Mandamus, to be directed to the Judge of the Prerogative Court of Canterbury, commanding him to grant Probate of the Will of Joseph Bidleson Esq. deceased, to Lovegrove.

Mr. Morton had obtained this Rule, upon the First Day of the present Term, there having been a Decree of a Court of Delegates, in Lovegrove's Favour, and in Affirmance of the Validity of the Will: But a fresh Caveat had been entered by a fresh Party, one Bethell, who claimed as next of Kin to the Testator.

Mr. Morton had cited *Cartherw* 457. *Rex v. Sir Richard Raines*, and 1 *Salk.* 299. S. C. where the Court granted a peremptory Mandamus commanding the Judge of the Prerogative Court to grant Probate of a Will to an Executor; though he was become Insolvent, and absconded. He had also cited 1 *Levins* 186. *Offley v. Best*, to shew that a Mandamus lies “to grant Administration according to the Statute.”

Mr. Dunning's Cause which he shewed against granting this Mandamus was “that a Suit is now depending in the Spiritual Court concerning the Validity of this Will.”

The COURT were unanimous, that where a Suit is depending in the Spiritual Court concerning the Validity of a Will, that Court has Jurisdiction in the Matter. And here the Validity of this Will is actually in Litigation in that Court.

And Mr. Justice ASTON mentioned a Cafe in this Court, in Hil. 1738. 12 G. 2. *Rex v. Dr. Bettefworth*, at the Instance of Plunkett, (of which I have a Note;) in which it was unanimously agreed by all the Four Judges (*Lee, Page, Probyn and Chapple*), “that the Pendency of a Suit in the Ecclesiastical Court concerning the Validity of a Will is a sufficient Answer to a Mandamus commanding the Judge to grant

" grant Probate of it :" And accordingly the Return in that Cause, " that there was a Suit depending before him, and undetermined, concerning the Validity of the Will," was allowed to be a good Return to the Mandamus.

RULE DISCHARGED.

The End of Hilary Term 1769. 9 Geo. 3.

In this Vacation,

Sir Fletcher Norton was made Chief Justice in Eyre of the Forests South of the Trent; sworn of the Privy Council; and quitted the Bar.

And

James Wallace, of the Middle-Temple, Esq. was appointed One of his Majesty's Counsel learned in the Law.

Easter Term

9 Geo. 3. B. R. 1769.

Sir FLETCHER NORTON came no more to the Bar; having been since last Term, appointed Chief Justice in *Eyre*, of the Forests South of *Trent*, and sworn of the Privy Council. Mr. Wallace was called within it.

Rex *versus* Edgar.

Wednesday,
12th April
1769.

Rex *versus* Brickell.

THESE were *Cross-Informations* in Nature of *Quo Warranto*, against Two Common-Council-Men of *Shrewsbury* (in opposite Interests) to shew, respectively, by what Authority they claimed that Franchise.

Mr. Serjeant *Burland* moved to *QUASH* both of them; both Parties *consenting* that they should be *quashed*.

But the COURT said it was an improper Motion; They could not be *quashed* upon Motion.

Serjeant *Burland* owned, that he thought so Himself; and changed his Motion to a more proper One, *viz.* that the *Recognizance* on both Sides should be *discharged*.

And this Motion being *consented* to on both Sides,

The COURT granted it: But they directed that the Rule should be taken as a Rule by *Consent*.

Saturd.
15th April
1769.

Rex *versus* John Pratt.

MR. Cox shewed Cause against quashing an Order of Sessions made upon the 11 G. I. c. 28. "for the better regulating of Buildings, and to prevent Mischiefs that may happen by Fire, &c."

The Workmen had certified to the Sessions, pursuant to the first Clause of that Act, "that a Party-Wall of a Stable was defective and ruinous, and ought to be pulled down." One Mr. Beake, thinking himself aggrieved by this Certificate, complained to the Justices: And they made an Order in Favour of the Complaint and against the Certificate; which they quashed, apprehending the Act of Parliament to be confined to Party-Walls between Houses, and not to extend to Party-Walls between STABLES.

*N.B. The first Section of this Act concludes thus--"and

"the Definitions of the said Justices shall be final and conclusive to all Parties, without any Appeal from the same."

Sir Fletcher Norton had moved to * quash this Order of Sessions; and called this Opinion of the Sessions a narrow Construction.

But Mr. Cox defended it; and observed that the Words of the Act were "House and Houses; and that there were no Expressions in it that were at all applicable to Stables.

The COURT were of Opinion with him; and unanimously discharged Sir Fletcher's Rule, which he had obtained before he left the Bar, and which was now supported by Mr. Bearcroft.

ORDER OF SESSIONS AFFIRMED.

Monday
17th April
1769.

Gibbon *versus* Paynton and Another.

THIS was an Action against the Birmingham Stage-Coachman, for 100*l.* in Money sent from Birmingham to London by his Coach, and lost. It was hid in Hay, in an old Nail-Bag. The Bag and Hay arrived safe: But the Money was gone. The Coachman had inserted an Advertisement in a Birmingham News-Paper, with a *Nota bene*, "that the Coachman would not be answerable for Money or Jewels or other valuable Goods, unless he had Notice that it was Money or Jewels or valuable Goods that was delivered

"vered to him to be carried." He had also distributed Hand-Bills, of the same import. It was notorious in that Country, that the Price of carrying Money from *Birmingham* to *London* was Three Pence in the Pound. The Plaintiff was a Dealer at *Birmingham*; and had frequently sent Goods from thence. It was proved that he had been used, for a Year and an Half, to read the News-Paper in which this Advertisement was published; though it could not be proved that he had ever actually read or seen the individual Paper wherein it was inserted. A Letter of the Plaintiff's was also so produced, from whence it manifestly appeared that he knew the Course of this Trade, and that Money was not carried from that Place to *London* at the common and ordinary Price of the Carriage of other Goods: And it likewise appeared from this Letter, that he was conscious that he could not recover, by Reason of this Concealment. The Jury found a Verdict for the Defendant.

Mr. Wallace, on behalf of the Plaintiff, moved (on Thursday 26th January 1769) for a new Trial, and obtained a Rule to shew Cause: Which Rule he now enforced, and was supported by Mr. Hobam.

They insisted that the Coachman was answerable; though he did not know that it was Money. A carrier is always answerable, unless he accepts the Goods *specially*: But the Circumstances of this Case, they said, do not amount to a *special Acceptance*. He made no Inquiry or Objection: Therefore he is answerable. It is incumbent upon him, to see that he is not cheated. He is bound to receive the Goods, and must run the Risque. If the Goods are lost by Negligence, or even if he is robbed, he is liable to answer for them. If the Trader deceives him, he may have an Action against the Trader, for this Deceit. In Proof of their Arguments and Assertions, they cited the following Cases.

Aleyn 93. *Kenrig v. Eggleston.* 1 *Ventr.* 238. a like Case cited by *Hale*, in determining the Reasons of the Resolution in the Case of *Morse v. Slue*. *Coggs v. Barnard*, in 1. *Salk.* 26. 3 *Salk.* 11. 268. and *Holt* 13, 131, 528. *Cartew* 485. *Sir Joseph Tylly et al. v. Morrice.* 2 *Shover* 81. *Bastard v. Bastard.* 1 *Stra.* 145. *Titchburne v. White*, at *Guild-ball*; where Lord Chief Justice King held "that if a Box is delivered generally to a Carrier, and he accepts it, he is answerable, though the Party did not tell him there is Money in it."

Mr. Dunning (Solicitor-General) and Mr. Mansfield argued on behalf of the Defendant, against a new Trial. They treated this Conduct of the Plaintiff as a Fraud and Deception upon the Defendant. A Carrier certainly may accept

cept specially : This Man has done so. The advertisement is explicit against being answerable for Money, without Notice. This Money was never fairly and properly intrusted to the Defendant : And a Carrier shall not be liable, where he is imposed upon ; which is the present Case.

Lord MANSFIELD distinguished between the Case of a Common Carrier, and that of a Bailee. The latter is only obliged to keep the Goods with as much Diligence and Caution as he would keep his own : But a Common Carrier, in respect of the Premium he is to receive, runs the Risque of them, and must make good the Loss, though it happen without any Fault in him ; the Reward making him answerable for their safe Delivery.

This Action is brought against the Defendant upon the Foot of being a Common Carrier. His Warranty and Insurance is in respect of the Reward he is to receive : And the Reward ought to be proportionable to the Risque. If he makes a greater Warranty and Insurance, he will take greater Care, use more Caution, and be at the Expence of more Guards or other Methods of Security : And therefore he ought, in Reason and Justice, to have a greater Reward. Consequently, if the Owner of the Goods has been guilty of a Fraud upon the Carrier, such Fraud ought to excuse the Carrier. And here the Owner was guilty of a fraud upon him : The Proof of it is over abundant. The Plaintiff is a Dealer at Birmingham. The Price of the Carriage of Money from thence is notorious in that Place : It is the Rule of every Carrier there. It is fairly presumed that a Man conversant in a Trade knows the Terms of it. Therefore the Jury were in the Right, in presuming that this Man knew it. The Advertisement and Hand-Bills were Circumstances proper to be left to the Jury. The Plaintiff's having been used, for a Year and an half, to read this News-Paper is a strong Circumstance for the Jury to ground a Presumption that he knew of the Advertisement. Then his own Letter strongly infers his Consciousness of his own Fraud, and that he meant to cheat the Carrier of his Hire. Therefore I entirely agree with the Jury in their Verdict. And if he has been guilty of a Fraud, how can he recover ? *Ex iusto malo non oritur Actio.*

As to the Cases cited—That of *Kenrig v. Eggleston*, in *Aleyn* 93, was 100l. in a Box delivered to a Carrier ; the Plaintiff telling him only, “ that there was a Book and Tobacco in the Box : ” and Roll directed that although the Plaintiff did tell him of some Things in the Box only, and not of the Money, yet he must answer for it ; for, he need not tell the Carrier all the Particulars in the Box : But it must come on the Carrier's Part to make special Acceptance. But in respect to the intended Cheat to the Carrier, he told

the

the Jury they might consider him in Damages : Notwithstanding which, the Jury gave 97*l.* against the Carrier for the Money only, (the other Things being of no considerable Value, abating only 3*l.* for Carriage. *Quod durum videbatur Circumstantibus.* Now, I own that I should have thought this a *Fraud*: And I should have agreed in Opinion with the *Circumstantibus*, which seems to have been also the Opinion of the Reporter.

So in the Case cited by *Hale*, in *Ventriss* 238, of a Box brought to a Carrier, with a great Sum of Money in it ; and upon the Carrier's demanding of the Owner " what was in " it ;" he answered " that it was filled with Silks and such " like Goods of mean Value;" upon which, the Carrier took it, and was *robbed* : And resolved " that he was *liable*." But (says the Case) if the Carrier had told the Owner " that " it was a dangerous Time ; and if there were Money in it, " he durst not take Charge of it ;" and the Owner had answered as before ; this Matter would have excused the Carrier. In this Case also, I own that I should have thought the Carrier excused, although he had not expressly proposed a Caution against being answerable for Money : For, it was artfully concealed from him, that there was any Money in the Box.

The Case of *Sir Joseph Tyle and Others against Morrice*, in *Cartbev* 458, was determined upon the true Principles— " that the Carrier was liable *only* for what he was *fairly told* " of." Two Bags were delivered to him, sealed up, said to contain 200*l.* and a Receipt taken accordingly, with a Promise " to deliver them to *T. Daves*; he to pay 10*s. per* " *Cem.* for Carriage and *Risque*." The Carrier was robbed. The Chief Justice was of Opinion that he should answer for no more than 200*l.* " because there was a particular Under- " taking by the Carrier for the Carriage of 200*l.* only ; and " his Reward was to extend no further than that Sum ; and " 'tis the Reward that makes the Carrier answerable : And " since the Plaintiffs had taken this Course to *defraud* the " Carrier of his Reward, they had thereby debarred them- " selves of that Remedy, which is founded *only* on the Re- " ward." So the Jury were (in that Case) directed to find for the Defendant.

For these Reasons, his Lordship was of Opinion, in the present Case, that the Plaintiff ought not to recover.

Mr. Justice *YATES* held that a Carrier *may* make a *special Acceptance* ; and that this *was* a *special Acceptance*.

By the general Custom of the Realm, a Common Carrier insures the Goods, at all Events : And it is right and reasonable

nable that he should do so : But he may make a special Contract ; or he may refuse to contract, in extraordinary Cases, but upon extraordinary Terms. And certainly, the Party undertaking ought to be apprized what it is that he undertakes : And then he will or at least may take proper Care. But he ought not to be answerable where he is *deceived*. Here he was deceived : The Money was hid in an old Nail-Bag ; and it was concealed from him, that it was Money. The Plaintiff's own Letter shews that he knew the Course of this Trade, and that Money was not in that Place carried at the common ordinary Price of carrying other Things. And if he was apprized of the Defendant's Advertisement, that might be equivalent to personal Communication of the Carrier's Refusal to be answerable for Money not notified to him ; And this was left to the Jury.

Mr. Justice ASTON, who tried the Cause, said he had no Doubt about the *Justice* of the Case : His Difficulty had only arisen from the Cases and Authorities which had been now mentioned ; which put him upon more Caution in admitting the Evidence. But it appeared to be notorious in the Country where this Transaction happened, that the Price of carrying Money from thence to London was Three Pence in the Pound : And it manifestly appeared that this was Money sent under a *Concealment* of its being Money. The true Principle of a Carrier's being answerable is the *Reward*. And a higher Price ought, in Conscience, to be paid him for the Insurance of Money, Jewels and valuable Things, than for insuring common Goods of small Value. And here, though it was not directly and strictly brought home to the Plaintiff that he had a clear certain Knowledge of the Defendant's Advertisements and Hand-Bills, yet it was highly probable that he must have known of them : And his own Letter shewed his being conscious that he could not recover, by Reason of the Concealment. Therefore I think the Verdict ought to stand.

Mr. Justice WILLES concurred in the same Opinion.

Per Cur', unanimously—

RULE DISCHARGED.

Millar.

Millar *versus* Taylor.Thursday
20th April
1769.

THIS CASE was a Revival of the old and often litigated Question concerning LITERARY PROPERTY: And it was the first Determination which the Question ever received, in this Court of KING'S Bench.

The Declaration was of Michaelmas Term in the Seventh Year of his present Majesty, 1766. The first Argument at the Bar was on Tuesday 30th of June 1767: When the Court ordered it to stand over to the next Term, for a second Argument. It was argued, a second Time at the Bar, on the 7th June 1768. The first Argument was by Mr. Dunning, for the Plaintiff; and Mr. Thurlow, for the Defendant: The second, by Mr. Blackstone for the Plaintiff; and Mr. Murphy, for the Defendant.

After the second Argument, the following Rule was made; *viz.*

"*Tuesday 7th June (in Trinity Term, 1768.)*
 " Millar. } "IT is ordered that this Cause shall stand
 " Taylor. } over for the OPINION of this Court, until
 " the next Term. And, by the CONSENT of the Counsel
 " for both Parties, it is further ordered, that the Judgment
 " which shall then be given, shall be ENTERED UP as a Judg-
 " ment of THIS Term, in the same Manner as if the said
 " Judgment had been given on this Day. Mr. Blackstone,
 " for the Plaintiff: Mr. Murphy, for the Defendant."

Note—Mr. Millar DIED the next Morning.

In Hilary Term 1769, 9 G. 3. (on Tuesday 7th February 1769.)

THE COURT ordered it to be set down in the Paper, upon the second Paper-Day of next Term, to the OPINION of the Court.

It would be too tedious and tautologous, to repeat the Arguments of the Counsel at the Bar, or the Cases and Authorities cited by them; as they were, all of them, so very fully and amply taken up again from the Bench, and so elaborately expatiated upon, canvassed, and discussed by the Judges, in delivering their Opinions, and the Reasons whereupon they formed them.

Let

Let it suffice to say, in general, That the Counsel for the Plaintiff insisted, "That there is a *real Property* remaining in Authors, *after Publication* of their Works; and that they ONLY, or those who claim under them, have a Right to multiply the Copies of such their literary Property, at Pleasure, for Sale. And they likewise insisted, "That This Right is a *Common Law* Right, which always has existed, and does still exist, independent of and not taken away by the Statute of 8 Ann, c. 19."

On the other Side, The Counsel for the Defendant absolutely denied that any such Property remained in the Author, *after the Publication* of his Work: And they treated the Pretension of a *Common Law* Right to it, as mere *Fancy* and *Imagination*, void of any Ground or Foundation. They said, that formerly the *Printer*, not the Author, was the Person who was supposed to have the Right, (whatever it might be:) And accordingly the Grants were all made to *Printers*. No Right remains in the Author, at *Common Law*.

They insisted, that if an original Author publishes his Work, he sells it to the Public: And the Purchaser of every Book or Copy has a Right to make what Use of it he pleases; and may multiply each Book or Copy, to what Quantity he pleases: and the sole exclusive Right of multiplying such Copies does not remain in the Author, *after Publication*. It would be a Monopoly, if it did. The Purchaser of the Book has the *jus fruendi et disponendi*.

The Act of Parliament of 8 Ann. c. 19. for the Encouragement of Learning, vests the Copies of printed Books in the Authors or Purchasers of such Copies during the Times therein limited. But it is only during that limited Time; and under the Terms prescribed by the Act. And the utmost Extent of the limited Time is, in the present Case, expired.

And they argued from the Case of *MECHANICAL INVENTIONS*; where it is admitted, "that the Rule does not hold." Yet the same Rule ought to hold, in all similar Instances. And the Copy of One of these is just like the Copy of the Other: And a great deal of *mental Labour* is often bestowed upon *Mechanical Inventions*, as well as upon *Literary Productions*.

Of Michaelmas Term, in the Seventh Year of the
Reign of King George the Third.

London, } BE it remembered, that on Thursday next after
to wit, } the Morrow of All Souls in this same Term,
before our Lord the King, at Westminster, comes Andrew
Millar, by John Stirling his Attorney, and brings into the
Court of our said Lord the King now here, his Bill against
Robert Taylor, in the Custody of the Marshal, &c a Plea of
Trespass upon the Case: And there are Pledges of prosecuting,
to wit, John Doe and Richard Roe. Which said Bill
follows in these Words, to wit, London, to wit. Andrew
Millar complains of Robert Taylor, being in the Custody of
the Marshal of the Marshalsea of our Lord the King Himself:
for this, to wit, that whereas the said Andrew, on the
20th Day of January in the Year of our Lord 1763, to wit,
in the Parish of St, Mary le Bow, in the Ward of Cheap,
was, and hath ever since been, and still is, the true and only
Proprietor of the Copy of a certain Book of Poems intituled
"The Seasons, by James Thomson." And whereas the said
Andrew, after he became and whilst he was Proprietor of
the said Copy as aforesaid, to wit, on the Day and in the
Year abovementioned, in the Parish and Ward aforesaid, did,
at his own proper Costs and Charges, cause 2000 Books of
the said Copy to be printed for Sale, and afterwards, to
wit, on the 20th Day of May, in the Third Year of the
Reign of his present Majesty, in the Parish and Ward aforesaid,
had a great Number, to wit, 1000 of the said Books
so printed of the said Copy intituled, "The Seasons, by
James Thomson," remaining in his Hands for Sale; Never-
theless the said Robert, not ignorant of the Premisses, but
contriving and fraudulently intending to deprive the said
Andrew of the whole Profit and Benefit of the said 1000
Books of the said Andrew intituled, "The Seasons, by James
Thomson," then remaining in his Hands for Sale, and injuri-
ously to prevent the Sale thereof: afterwards, to wit, the Day
and Year last abovementioned, to wit, in the Parish and Ward
aforesaid, did publish and expose to Sale several other Books,
intituled, "The Seasons, by James Thomson," to wit, 1000
other Books of the like Copy, which last-mentioned Books, in-
tituled, "The Seasons, by James Thomson," had been injur-
iously printed by some Person or Persons without the Licence or
Consent of the said Andrew; and then and there sold several,
to wit, 20, of the said last abovementioned Books so printed
as last mentioned; he the said Robert then and there well
knowing that the same had been so injuriously printed with-
out the Licence or Consent of the said Andrew; by Means
whereof, the said Andrew was deprived of the Profit and
Benefit of the said Copy and Book, intituled "The Seasons,
" by James Thomson;" and of the said 1000 Books so printed,

at his Costs and Charges as aforesaid, and then remaining in his Hands unfold: Whereby the said Andrew is injured and hath Damage to the Amount of 200l; and therefore he brings this Suit, &c.

**Special
Verdict.**

The Defendant pleaded the general Issue, "Not Guilty." And, upon the Trial, the Jury found a *special Verdict*, as follows—That the said Work intituled "The Seasons" is an *Original Composition* in one Volume, composed by *James Thomson*, Esq; a natural born Subject resident in that Part of Great Britain called *England*; and *first printed and published by the said James Thomson the Author*, for his own *Use and Benefit* as the *Proprietor* thereof, at several Times, between the Beginning of the Year 1727 and the End of the Year 1729, in the City of *London*; the same having never before been printed elsewhere. And the said Jurors upon their said Oath further say, that the said *Andrew Millar*, in the Year 1729, purchased the said Work called "The Seasons," for a *valuable and full Consideration*, from the said *James Thomson, the said Author and Proprietor*, to Him and his *Heirs and Assigns* for ever. And the said Jurors upon their said Oath further say, That from the Time of the said Purchase, the said *Andrew Millar* hath printed and sold the said Work as his *Property*, and now hath and constantly hath had a sufficient Number of Books of the said Work exposed to sale at a reasonable Price. And the said Jurors upon their Oath further say, That before the Reign of Her late Majesty Queen Anne, it was *usual to purchase from Authors the PERPETUAL Copy-Right of their Books*; and *assign* the same from Hand to Hand, for valuable Considerations; and to make the same the Subject of *Family Settlements*, for the Provision of *Wives and Children*. And the said Jurors upon their Oath further say, That the Stationers Company, to secure the Enjoyment of the said Copy Right as far as in them lay, made several By-Laws, particularly the Two following:

At an Assembly of the Masters and Keepers or Wardens and Commonalty of the Mystery or Art of Stationers of the City of London, held at their Common Hall in the Parish of St. Martin, Ludgate, in the Ward of Farringdon within London, on Wednesday the 17th Day of August Anno Domini 1681, for the well governing the Members of this Company, the several Laws and Ordinances hereafter mentioned were then made, enacted and ordained by the Master and Keepers or Wardens and Commonalty of the Mystery or Art of Stationers of the City of London, in Manner and Form following, viz.

And whereas several Members of this Company have great Part of their Estates in Copies; and by ancient Usage of this Company,

Company, when any Book or Copy is *duly entered* in the Register-Book of this Company to any Member or Members of this Company, such Person to whom such Entry is made, is and always hath been reputed and taken to be PROPRIETOR of such Book or Copy, and ought to have the sole Printing thereof; which Privilege and Interest is now of late often violated and abused—It is therefore ordained that, where any Entry or Entries is or are, or hereafter shall be duly made, of any Book or Copy in the said Register-Book of this Company, by or for any Member or Members of this Company, that in such Case, if any Member or Members of this Company shall then after, without the Licence or Consent of such Member or Members of this Company for whom such Entry is duly made in the Register-Book of this Company, or his or their Assignee or Assigns PRINT or CAUSE to be PRINTED, import or CAUSE to be IMPORTED from beyond the Seas or elsewhere, any such Copy or Copies, Book or Books or any Part of any such Copy or Copies, Book or Books; or shall sell, bind, stitch or expose the same or any Part or Parts thereof to Sale, that then such Member or Members so offending shall FORFEIT, to the Master and Keepers or Wardens and Commonalty of the Mystery or Art of Stationers of the City of London, the Sum of Twelvepence for every such Copy or Copies, Book or Books or any Part of such Copy or Copies, Book or Books, imprinted, imported, sold, bound, stitched, and exposed to Sale contrary hereunto.

At an Assembly of the Masters and Keepers or Wardens and Commonalty of the Mystery or Art of Stationers of the City of London, held at their Common Hall in the Parish of St. Martin Ludgate, in the Ward of Farringdon within London, on Monday the 14th Day of May Anno Domini 1694, the several Laws, Ordinances and Oath hereafter following were then by them made, enacted, and ordained, for the well-governing of the Members of the Corporation of them the said Master and Keepers or Wardens and Commonalty of the Mystery or Art of Stationers of the City of London, viz.

Whereas divers Members of this Company have great Part of their Estates in COPIES, duly entered in the Register-Book of this Company; which, by the ancient Usage of this Company, is, are or always hath and have been used, reputed, and taken to be the RIGHT AND PROPERTY of such Person and Persons (Members of this Company) for whom or whose Benefit such Copy and Copies are so duly entered in the Register Book of this Company; and constantly bargained and sold, amongst the Members of this Company, as their Property; and devised to Children and Others, for Legacies, and to their Widows for their Maintenance; and that he

and

and they to whom such Copy and Copies are so duly entered purchased, or devised, ought to have the sole PRINTING thereof;

Wherefore, for the better preservation of the said ancient Usage from being invaded by evil minded Men, and to prevent the Abuse of Trade by violating the same, it is ordained, that after any Entry or Entries is or are or shall be duly made of any Copy or Copies, Book or Books in the Register-Book of this Company or from any Member or Members of this Company, if any other Member or Members of this Company shall without the Licence or Consent of such Member or Members of this Company for or by whom such Entry is duly made, or of his Assignee or Assigns, print or cause to be printed, import or cause to be imported from beyond the Seas or elsewhere, any such Copy or Copies, Book or Books, or Part of any such Copy or Copies, Book or Books whereof such due Entry hath been made in the Register-Book of this Company to or for such other Member of this Company ; or shall sell, bind, fitch or expose the same or any Part or Parts thereof, to Sale, without such Licence ; that then such Member and Members so offending shall forfeit and pay to the Master and Keepers, or Wardens and Commonalty of the Mystery or Art of Stationers of the City of London, the Sum of Twelvepence for every such several Copy or Copies, Book or Books, Part or Parts of every such Copy or Copies, Book or Books, imprinted, imported, sold, bound, fitcht, or exposed to Sale without such Licence or Consent as aforesaid.

And the said Jurors upon their said Oath further say, That the said Book or Work intituled "The Seasons" was, upon the said Purchase thereof by the said Andrew Millar ; and before the Publication and Sale thereof by the said Robert Taylor, DULY ENTERED in the Register of the Company of Stationers of the City of London, as the whole and sole Property of the said Andrew Millar. And the said Jurors, upon their said Oath further say, That the said James Thomson, the said Author of the said Work, died on the 29th Day of August in the Year 1748 ; and that after his Death, and before the above Action was brought, the said Robert Taylor, without the Licence or Consent of the said Andrew Millar, on the 20th Day of May in the Year 1763. PUBLISHED, EXPOSED, TO SALE, AND SOLD, within that Part of Great Britain called England, several Copies of the said Book, intituled, "The Seasons, by James Thomson ;" which last mentioned Copies had been printed by some Person or Persons without the Licence or Consent of the said Andrew Millar ; whereby the said Andrew Millar hath been and is damnified. But whether, upon the whole Matter aforesaid in Form aforesaid found, the said Robert Taylor is LIABLE IN LAW to answer the Damages sustained by the said Andrew Millar by Reason or Means of the said Robert Taylor's publishing, selling and exposing

exposing to Sale within that Part of *Great Britain* called *England* the said several Copies of the said Book intituled "The Seasons, by *John Thomson*," without the Licence or Consent of the said *Andrew Millar* as aforesaid, the Jurors aforesaid are altogether ignorant; and therefore pray the Advice of the Court here. And if upon the whole Matter by the said Jurors in Form aforesaid found, it shall seem to the Court here, that the said *Robert Taylor* is liable by Law to answer the Damages sustained by the said *Andrew Millar* on the Occasion of the Premisses within mentioned, then the said Jurors upon their said Oath say, that the said *Robert Taylor* is guilty of the Premisses within laid to his Charge as the said *Andrew Millar* hath within complained against him; and assess the Damages to the said *Andrew Millar* occasioned by the Premisses within mentioned, besides his Costs and Charges by him about his Suit in this Particular laid out, to one Shilling; and for such Costs and Charges, to Forty Shillings. And if upon the whole Matter aforesaid by the Jury aforesaid in Form aforesaid found, it shall seem to the Court here, that the said *Robert Taylor* is not liable in Law to answer for the Damages within mentioned; then the said Jurors upon their Oath aforesaid say, that the said *Robert Taylor* is not guilty of the Premisses within laid to his Charge, as the said *Andrew Millar* within in Pleading hath alledged.

THE short Substance of the Case is no more than this. Substance The Declaration charges, that the Plaintiff *Millar* was the Proprietor of the Copy of a Book of Poems, intituled, "The Seasons, by *James Thomson*"; and, whilst he was so Proprietor of the said Copy caused 2000 Books of it to be printed for Sale, at his own Expence; and had a great Number of the said 2000 Books remaining in his Hands for Sale. That the Defendant *Taylor* published and exposed to Sale several other Books of the like Copy, and bearing the same Title; which latter Books had been injuriously printed by some Person or Persons WITHOUT the Licence or Consent of the Plaintiff *Millar*; The Defendant knowing "that they had been so injuriously printed, without the Plaintiff's Licence or Consent." By means whereof, the Plaintiff *Millar* was deprived of the Profit and Benefit of the said Copy and Book, and of the Books printed at his Expence as aforesaid, and then remaining in his Hands unsold. And he lays his Damages at 200*l.* The Defendant *Taylor* pleads, "Not Guilty." Issue is thereupon joined. And the Jury find the Special Verdict as above.

THE JUDGES delivered their Opinions separately, and at large; The junior Judge beginning, and so proceeding upward to the Lord Chief Justice.

Mr.

Mr. JUSTICE WILLES, after stating the Case and Special Verdict, spoke to the following Effect. The Questions of Law must arise out of the Facts found by this Verdict. Some of them are worthy of Observation.

It is found "that the Work is an *Original Composition*, first printed and published in *London*; the *Author*, a natural born Subject, resident in *England*." Therefore this Case has nothing to do with *foreign Books*; which stand on a very different Footing.

It is found, "that the *Author printed* this Work from the Beginning of the Year 1727, to the End of 1729, for his own Use and Benefit as the Proprietor; and then sold the Copy to the Plaintiff, his Heirs and *Assigns* for ever, for a full and valuable Consideration." Therefore there is no Occasion to meddle with Cases, where the Author may be supposed to have relinquished the Copy, and consequently to have given a general Licence to print.

Many of the best Books fall under that Description. A very little Evidence might be sufficient, after the Author's Death, to imply such a tacit Consent: As if the Book had not been entered before Publication; it would be a Circumstance to be submitted to the Jury, "that the Copy was intended to be left open." So, if after Publication, the Author had not transferred his Right, or acted himself as Proprietor.

But the Finding here, being of a Sale and Transfer for a valuable Consideration, this Verdict will not authorize any Claim founded on the supposed Consent of the Author.

It is also found, "That the Plaintiff always had a sufficient Number of these Books exposed to Sale, at a reasonable Price." Therefore this Case has nothing to do with Cases where the Plaintiff's Relief may be rebutted, by shewing that he means to enhance the Price; which is against Law.

It is found too "That the Defendant sold several Copies of the said Book." And therefore this Case is not embarrassed with any Question, wherein consists the IDENTITY of a Book."

Certainly bona fide Imitations, Translations, and Abridgments are different; and, in respect of the Property, may be considered as new Works: But colourable and fraudulent Variations will not do.

This is not the Case of an *unpublished Manuscript* taken in Execution by Creditors or claimed by Assignees under a Commission against a *Bankrupt-Author*. When a Question of that Sort arises, the Court will consider what is Right. And the same Question may equally arise upon the Term granted by the *Act of Parliament*. And therefore this is not a Doubt which subsists merely on the *Common Law Right*.

If the Copy of the Book belonged to the Author, there is no doubt but that he might transfer it to the Plaintiff. And if the Plaintiff, by the Transfer, is become the Proprietor of the Copy, there is as little Doubt that the Defendant has done him an Injury and violated his Right : For which, this Action is the proper Remedy.

But the *Term of Years secured by 8 Ann. c. 19 is expired*. Therefore the *Author's Title to the Copy depends upon Two Questions*—

1st. Whether the *COPY of a Book or literary Composition, belongs to the Author, by the COMMON LAW*;

2d. Whether the *COMMON LAW RIGHT of Authors to the Copies of their own Works is TAKEN AWAY by 8 Ann. c. 19*.

The Name, “*COPY of a Book*,” which has been used for Ages, as a Term to signify the *SOLE Right of printing, publishing and selling*, shews this Species of Property to have been long known, and to have existed in Fact and Usage, as long as the Name.

Till the Year 1640, the Crown exercised an unlimited Authority over the Press; which was enforced by the summary Powers of Search, Confiscation and Imprisonment, given to the Stationers Company, all over the Realm and the Dominions thereunto belonging, and by the then supreme Jurisdiction of the Star-Chamber, without the least Obstruction from Westminster-Hall, or the Parliament, in any Instance

“Whether before 1640, Copy-Rights existed in this Kingdom upon Principles and Usage,” can be only looked for in the Stationers Company, or the Star-Chamber, or *Acts of State*.

As to this Point, their Evidence is competent, and liable to LITTLE Suspicion. It was indifferent to the Views of Government, whether the Copy of an innocent Book licensed, was open, or private Property. It was certainly against the Power

Power of the Crown, to allow it as a *private Right*, without being protected by any Royal Privilege.

It could be done only on Principles of *private Justice, moral Fitness*, and *public Convenience*; which, when applied to a new Subject, make Common Law *without a Precedent*; much more, when received and approved by *Usage*.

It appears from the Acts of State taken Notice of at the Bar, that unless *Pirating another Man's Copy* be an Abuse on such Principles as make Common Law, it was *not prohibited*. If it be such an Abuse, then there are general Words in several Prohibitions, to include it.

The Decree of the Star-Chamber in 1556, regulating the Manner of Printing and the Number of Presses is confirmed, with additional Penalties, by Ordinances of the Star-Chamber *29th June* signed by Sir N Bacon, Ld. Burleigh, and all the most eminent Privy Counsellors of that Age.

Strype's Life of

Archbishop Parker, 221. Among other Things, it is forbidden to print against the Force and Meaning of any Ordinance, Prohibition or Commandment in any of the Statutes or *Laws* of this Realm; or in any Injunction, Letters Patent, or Ordinances forth or to be set forth by the Queen's Grant, Commission or Authority.

By another Decree of the Star-Chamber, 23 June 1585, 28 Eliz. Art. 4. + Every Book, &c, is to be licensed—"nor shall any One print any Book, Work or Copy, against the Form or Meaning of any Restraint contained in any Statute Whitgift, " or *Laws* of this Realm, or in any Injunction made by her Majesty or her Privy Council; or against the true intent Appendix, " and Meaning of any Letters Patent, Commissions or Pro- No. 24. " hibitions under the Great Seal; or contrary to any allowed Ordinance set down for the good Government of the Sta- tioners Company."

A Proclamation of the 25th September 1623, 21 Jac. 1. recites the above Decree of 28 Eliz. and that the same had been evaded, amongst other Things, " By printing beyond Sea such allowed Books, Works or Writings, as have been imprinted within the Realm by such to whom the sole Printing thereof, by Letters Patent, or lawful Ordinance or Authority, doth appertain." And then this Proclamation enforces the said Decree.

By another Decree of the Star-Chamber, made on 11th July 1637, Article the 7th,—No Person is to print, or import (printed abroad) any Book or Copy which the Company of Stationers, or any other Person hath or shall by any Letters Patent,

Patent, Order or Entrance in their Register-Book, or otherwise, have the Right, Privilege, Authority or Allowance SOLELY to print.

These are all the *Acts of State* relative to this Matter.

No Case of Prosecution in the Star-Chamber, for printing without Licence, or against Letters patent, or pirating another Man's Copy, or any other disorderly printing, has been found. Most of the Judicial Proceedings of the Star-Chamber are lost or destroyed.

But it is certain, that down to the Year 1640, Copies were protected and secured from Piracy, by a much speedier and more effectual Remedy, than Actions at Law or Bills in Equity.

No LICENCE could be obtained, "to print another Man's Copy :"—Not from any Prohibition; but because the Thing was immoral, dishonest, and unjust. And he who printed WITHOUT a Licence, was liable to great Penalties.

Mr. Blackstone argued very materially from the Books of the Stationers Company; and read many Entries. And from the Extract of them, it appears that there is no Ordinance or By-Law relative to COPIES, till after the Year 1640: And yet, from the Direction of the Company, Copies were entered as Property; and pirating was punished.

Their first Charter was in 1556; their second, in 1558.

In 1558, and down from that Time, there are Entries of Copies for particular Persons.

In 1559, and downward from that Time, there are Persons fined for printing other Men's Copies.

In 1573, there are Entries which take Notice of the Sale of the Copy, and the Price.

In 1582, there are Entries with an express Proviso, "that if it be found any Other has Right to any of the Copies, then the Licence, touching such of the Copies so belonging to another, shall be void."

It is remarkable, that the Decree of the Star-Chamber in 1637 expressly supposes a Copy-Right to exist otherwise than by Patent, Order, or Entry in the Register of the Stationers Company: Which could only be by COMMON LAW.

But in 1640, the *Star-Chamber* was abolished. The Troubles began soon after. The King's Authority was set at nought: all Regulations of the Press, and Restraints of unlicensed Printing, by Proclamations, Decrees of the Star-Chamber, and Charter-Powers given to the Stationers Company, were deemed to be, and certainly were illegal.

The *Licentiousness of Libels* induced the Two Houses to make an *Ordinance* which prohibited Printing, unless the Book was first licensed, and entered in the Register of the Stationers Company. *COPY-RIGHTS*, in their Opinion, then could only stand upon the *COMMON LAW*; Both Houses take it for granted.

The *Ordinance* therefore prohibits *Printing*, without *Consent of the Owner*; or *importing* (if printed abroad;) upon Pain of forfeiting the same to the *OWNER OR OWNERS of the Copies of the said Books, &c.*

This Provision necessarily supposes the *Property to EXIST*: It is nugatory, if there was no *OWNER*. An *Owner* could not, at that Time, exist, but by the *COMMON LAW*.

In November 1644, *MILTON* published his famous *Speech*, for the Liberty of unlicensed Printing, against this *Ordinance*: And among the *Glosses* which he says were used to colour this *Ordinance*, and make it pass he mentions “the just “ retaining of each Man his several Copy; which God for-“ bid should be gain-said!”

So little did he, (though an Enthusiast for Liberty,) think that the Liberty of unlicensed Printing should extend to violate the *Property of Copies!* And yet, this *Copy Right* could, at that Time, stand upon no other foundation, than *natural Justice* and *Common-Law*. Those who were for, and those who were against a Licenser, all agreed “That Literary Prop-“ perty was not the Effect of arbitrary Power, but of *Law* “ and *Justice*; and therefore ought to be safe.”

In 1649, the *Long Parliament* made an *Ordinance* which forbids printing any Book legally granted, or any Book entered, without *Consent of the Owner*; upon Pain of Forfeiture, &c.

The same Observations occur upon this list, as upon the former *Ordinance*.

In 1662, the *Act of 13 & 14 C. 2.* (the *Licensing Act*) prohibits printing any Book, unless first licensed, and entered in the Register of the Stationers Company: It also prohibits Printing

Printing without the Consent of the OWNER, upon Pain of forfeiting the Book, and 6s. 8d. each Copy; half to the King, and half to the OWNER; to be sued for by the Owner, in Six Months; besides being otherwise prosecuted as an Offender against the Act.

The Act supposes an Ownership at Common Law. And the Right itself is particularly recognized in the latter Part of the third Section of the Act; where the Chancellor and Vice-Chancellor of the Universities are forbid to meddle with any Book or Books, the Right of printing whereof doth solely and properly belong to any particular Person or Persons.

The sole Property of the Owner is here acknowledged in express Words as a Common Law Right: And the Legislature who passed that Act, could never have entertained the most distant Idea, "that the Productions of the Brain were not a Subject Matter of Property." To support an Action on this Statute, Ownership must be proved; or the Plaintiff could not recover: Because the Action is to be brought by the Owner; who is to have a Moiety of the Penalty.

The various Provisions of this Act effectually prevented Piracies; WITHOUT Actions at Law, or Bills in Equity, by Owners.

But Cases arose of disputed Property. Some of them were between different Patentees of the Crown: Some, "whether it belonged to the Author, from his Invention and Labour; or the King, from the Subject Matter;" which occasioned these Points to be agitated in Westminster Hall.

The first Case on this Subject was between Atkins, the M. 18 C. 2. Law-Patentee, and some Members of the Stationers Company. The Plaintiff claimed under the Law-Patent. The Defendants had printed Roll's Abridgment. The Bill was brought for an injunction. And the Lord Chancellor awarded an injunction against every Member of the Company. The Defendants appealed to the House of Lords: And the Decree was affirmed.

This was argued on the Footing of a Prerogative Copyright in the Crown, in all Law-Books. It was urged, that the King pays the Judges who pronounced the Law—That the Laws are the King's Laws, &c. I do not enter into the Reasons of the Determination; but only cite it to show that the Lords went upon this Doctrine, which was not disputed, "that a Copy-Right was a Thing acknowledged at Common Law;" And then they agreed "that the King hath this Right, and had granted it to the Patentees." In this Light, this

Case was very properly stated by M. *Blackstone*; and argued from, as being an Authority in his Favour.

The next Case was that of *Roper v. Streater*, *Skinner* 234. and mentioned and alluded to, in *1 Mod* 257. Which came on, before this Court (Lord Chief Justice Hale then presiding) about 22 C. 2. and Judgment was given M. 24 C. 2. *Roper* had bought, from the Executors of Mr. Justice *Croke*, the third Part of his Reports. *Streater* was Law-Patentee; and reprinted it, without the Plaintiff's Consent. *Roper* brought an Action of Debt, as Owner, upon the Licensing *Act*. *Streater* pleaded the King's Grant. Upon which, the Plaintiff demurred: And it was adjudged for the Plaintiff, in the Common Pleas. Which is a judicial Authority in Point, "that the Plaintiff, by Purchase from the Executors of the Author, was Owner of the Copy at Common Law."

Nor did the Reversal* in the House of Lords at all shake this Authority; because the Reversal proceeded (as in the Case of *Atkyns*) upon an opinion "That the Copy belonged "to the King."

Besides, it appears that the Judges were not asked their Opinions, on this Occasion; And probably they would not have concurred in the Reversal; as the Majority of the House of Lords, who were for reversing, refused to hear their Opinions. For, it is said, in the Journals, that after various Debate and Consideration, the Question was propounded "Whether the Judges should be heard in this Case:" And it was resolved in the Negative; dissentiente Anglesey.

In the argument of the Case of *The Stationers Company* against *Parker*, in *Skinner* 223, it is said, "It is true, that this Action of *Roper v. Streater* was brought on the Act of 14 C. 2 which is expired. But that Statute did not give a Right, but only an Action of Debt." [Vide *Skinner*, 234.]

The next Case is that of *The Company of Stationers v. Seymour*, 29 Car. 2. in *1 Mod* 256. The Plaintiffs, as Grantees of the Crown, brought an action of Debt against the Defendant, for printing *Gadsbury's Almanac*. *Pemberton*, in his Argument said, when Sir Orlando Bridgeman was Chief Justice in this Court (the Common Pleas) there was a Question raised concerning the Validity of a Grant of the sole printing of any particular Book, with a Prohibition to all Others to print the same: "How far it should stand good against those who claim a Property PARAMOUNT the King's Grant;" And Opinions were divided on that point.

But

* On 26th May 1705.

But (said he, the Defendant, in our Case, makes no Title to the Copy : He only pretends a Nullity in our Patent.

The Book which this Defendant hath printed has *no certain Author* : And then, according to the Rules of Law, the *King* has the Property ; and, by Consequence, may grant his Property to the Company.

The Court thought that *Almanacs* might be *Prerogative Copies* ; and said, " These *Additions* of Prognostications do " not alter the Case ; no more than if a Man should claim " a Property in another Man's Copy, by Reason of some " *inconsiderable Additions of his Own.*"

These were Times when Prerogative ran high. But still these Cases prove " that the *Copy-Right* was at that Time a " *well-known Claim* ;" though the overgrown Rights of the Crown were, in some Instances, allowed and adjudged (as in this Case) to over-rule them.

The *Licensing Act* of C. 2. was continued by several Acts of Parliament ; but expired 9th May, 1679. 31 C. 2. Soon after which, there is a Case in *Lilly's Entries*, of *Hilary Term* 31 C. 2. B. R. * an Action on the Case brought for printing * *Lilly's Pilgrim's Progress* ; of which the Plaintiff was and is the Entries 67. true Proprietor : whereby he lost the Profit and Benefit of his Ponder v. Copy. But I don't find, that this Action was ever proceeded Bardyl. ed in.

The Licensing Act of 13 & 14 C. 2. was revived by 1 Jac. 2. c. 7 ; and continued by 4 W. & M. c. 24 ; and finally expired in 1694.

For Five Years successively, Attempts were made for a new Licensing Act. Such a Bill once passed the House of Lords : But the Attempts miscarried, upon Constitutional Objections to a *Licensor*.

The Proprietors of Copies applied to Parliament, in 1703, 1706, and 1709, for a Bill to protect their Copy-Rights which had been invaded, and to secure their Properties. They had so long been secured by *Penalties*, that they thought an *Action at Law* an *inadequate Remedy* ; and had no Idea a *Bill in Equity* could be entertained, but upon *Letters Patent* adjudged to be legal. A *Bill in Equity*, in any other Case, had never been attempted or thought of : An *Action* upon the Case was thought of in 31 C. 2 ; but was * not proceeded in.

* Ponder v.
Brady.

In one of the Cases given to the Members in 1709, in Support of their Application for a Bill, the last Reason or Paragraph is as follows—"The Liberty now set on Foot of breaking through this ancient and reasonable Usage is no way to be effectually restrained, but by an Act of Parliament. For, by *Common Law*, a Bookseller can recover no more Costs than he can prove *Damage*: But it is impossible for him to prove the Tenth, nay perhaps the Hundredth Part of the Damage he suffers; because a Thousand Counterfeit Copies may be dispersed into as many different Hands all over the Kingdom, and he not be able to prove the Sale of Ten. Besides, the Defendant is always a Pauper: and so the Plaintiff must lose his Costs of Suit. (No Man of Substance has been known to offend in this Particular: nor will any ever appear in it.) Therefore the only Remedy by the *Common Law*, is to confine a Beggar to the Rules of the King's Bench or Fleet: and there he will continue the evil Practice with Impunity. We therefore pray, that CONFISCATION of Counterfeit Copies be One of the Penalties to be inflicted on Offenders."

On the 11th of January 1709, pursuant to an Order made upon the Bookseller's Petition, a Bill was brought in, for securing the Property of Copies of Books to the rightful Owners, &c. On the 16th of February, 1709, the Bill was committed to a Committee of the whole House; and reported with Amendments, on the 21st of February, 1709.

I shall consider the Bill as it passed into a Law, and the Arguments drawn from the Alterations made in the Course of its passing in the House of Commons, when I come to the second Head or Question which I proposed to speak to; and now proceed upon the Fact of Usage and Authority since 1709.

The Court of Chancery, from that Time to this Day, have been in an Error, if the whole Right of an Author in his Copy depends upon this *positive* Act, as introductory of a new Law. For, it is clear, the Property of no Book is intended to be secured by this Act, unless it be ENTERED: Nobody offends against this Act, unless the Book be ENTERED. Consequently, the sole *Copy-Right* is not given by the Act, UNLESS the Book be entered. Yet it is held unnecessary to the Relief in Chancery, that the Book should be entered.

There is also an express Proviso, "That all Actions, Suits, Bills, &c, for any Offence that shall be committed against this Act, shall be brought, sued and commenced within three

"three Months after such Offence committed; or else, the same shall be void and of none Effect."

If all Copies were open and free before, Pirating is merely an Offence against Statute; and can only be questioned, in an Court of Justice, as an Offence against this Act. Yet it is not necessary that the Bill in Chancery should be brought within three Months.

Again, if the Right vested, and the Offence prohibited by this Act be new, no Remedy or Mode of Prosecution can be pursued, besides those prescribed by the Act. But a Bill in Chancery is not given; and consequently could not be brought upon this Act.

There is no Ground, upon which this Jurisdiction has been exercised or can be supported, except the ANTECEDENT Property confirmed, and secured for a limited Term, by this Act. In this Light, the ENTRY of the Book is a Condition in respect of Statutory Penalty only: So likewise the Three Months is a Limitation in respect of the Statutory Penalty only. But the Remedy by an Action upon the Case, or a Bill in Chancery, is a Consequence of the Common Law-Right; and is not affected by the Statutory Condition or Limitation.

Mr. Murphy cited and laid Stress upon the Case of *Millar v. Kincaid et al.* in the House of Lords, 11th of February 1750. In that Case, the Suit was brought upon the 8 Queen Ann and 12 G. 2. c. 36, by Seventeen Booksellers of London, Plaintiffs, against Twenty-four Booksellers of Edinburgh and Glasgow, Defendants; for having offended against these two Acts, as to many Books specified; praying the Penalties, and an Injunction and Account, by Way of Damages.

The Plaintiffs restrained their Demand to an Account of Profits, by Way of Damages, for Two or Three Books only.

The Court found, "That there lies no Action of Damages, 1st Interlocutor, 4th July, 1746.
" in this Case."

The Plaintiffs petitioned for Rehearing; and insisted that the 8 of Queen Ann gave an ADDITIONAL Security by Penalties, during a limited Time, to a Property which EXISTED BEFORE; and therefore was declaratory of the Property; and that the Court of Chancery had always understood it in this Sense, and given Relief, in Consequence of the COMMON-LAW Property, declared, and secured by the Act for a limited Time by Penalties.

The Court found, "That an Action of Damage lies to the 2d Interlocutor, 24th Extent of the Profits made by the Defendants, on such of December
" the 1746.

" the Books libelled, as have been entered in the Stationers Hall and reprinted in Britain."

The Defendants prayed a Review.

The Court ordered the Cause to be re-argued ; and directed them to consider " Whether, by the Laws of Scotland, an Action lay, at the Instance of an Author or Proprietor of a Book BEFORE the Statute."

The Cause was further heard and debated : But both Sides avoided the Question upon the Common Law. The Plaintiffs, probably, were advised not to put their Case upon the Common Law of Scotland ; because the Books were printed and published in London, and therefore might be considered as foreign Books. And the Defendants, thinking themselves strong against an Action of Damages upon the Statute, rested upon that Ground ; and insisted that the Action being brought upon the Statute, the Plaintiffs could not resort to the Common Law.

^{3d Interlo-} The Court therefore gave no Opinion, as to the Common Law ; but found, " That no Action lies on the Statute, for Offences against the same, except when it is brought within ^{2 De-} 1747. " Three Months after the Committing such Offence : And " that no Action lies, except for such Books as have been entered in Stationers Hall in Terms of the Statute." And " that no Action of Damages lies on the Statute."

The Plaintiffs prayed a Review ; and objected to the Ambiguity of the Proposition, " That no Action of Damages lies on the Statute ; because they did not contend " that such Action was given by the Statute ;" but that it followed the ANTECEDENT Property, declared and secured by the Statute. And they urged the Practice of the Court of Chancery.

^{4th Interlo-} The Court found, " That no Action of Damages doth lie upon or in Consequence of the Statute, but only for the Penalties." ^{7 June 1748.}

The Plaintiffs appealed to the House of Lords. In their Reasons annexed to the printed Case, they say " The Court of Chancery has construed 8 Ann, as declaratory of an Author's Property ; and the Remedies and Penalties thereby given for a limited Term, upon certain Conditions, as ADDITIONAL SANCTIONS only, to preserve that Property from being injured." And in another Part of the Reasons, they insist " That it is like the Case of a Patent granted for any new and useful Invention : The Patentee, in Consequence of his Property, is intitled to the ordinary Relief in Courts of Law and Equity."

It is remarkable that the Respondents, (who had very able Men for their * Counsel,) in *their Reasons*, do not litigate, *Mr. Hume
 " that the Statute was to be considered as giving an *additio-*
nal Security;" nor consequently, the Competence of an
 Action for Damages: They only say, " If it is taken as an
 Action upon the Case, it can not be joined with an Action
 for the *Penalties*; and infit, from Objections to the Me-
 thod of proceeding, that the Plaintiffs could not recover."

Campbell
and Mr.
Yorke.

Mr. Murphy cited a Manuscript, which says, Lord Hardwicke, in moving for the Resolution of the House, spoke to the following Effect—" As to the *Origin of Relief*, given " in the Court of Chancery, by *Injunction and Account*—The " Statute of Jac. I. which took away *Monopolies*, at the same " Time gave the King a Power to grant *Patents* for the En- " couragement of new Inventions for *Fourteen Years*. These " Patents were *inrolled in Chancery*: and the Court upon " Complaint of the Patentee, would take Notice of its own " Records.

" The Statute of Queen Ann might be considered as a " *Standing Patent* to Authors: And being a *Record of the* " *biggest Nature*, the Court will give Relief.

But he doubted whether that Statute was *declaratory* of the " *Common Law*; or *introductive* of a new Law, to give learn- " ed Men a Property which they had not before.

" He said, it was material to consider how the Common " Law of Scotland stood before the Statute: And he repeat- " ed, more than once, that as the Question could not be ju- " dicially determined upon the present Appeal, he would be " still open to all Reasonings upon the Subject; and would " not be understood to give an Opinion which might bind " himself."

This Account of what Lord Hardwicke said, is taken from a Letter said to be written to the Respondents in *Scotland*, by their Solicitor. It purports only to be *Heads*, by Way of *Narration*; and not a Report of his *Words*, or the *Order* in which he spoke, or all he said; and plainly contains what the Solicitor thought would make most for his Clients.

Lord Hardwicke must have intimated more of his Opinion than is mentioned in the Letter; by his repeatedly guarding " that he would not be understood to give an Opinion which " might bind himself."

What

What he is reported to have said, is very material, in this Light.

The only Question brought before the House by the Appeal, was, "Whether any Remedy lay, in Consequence of "the Statute, except for the *Penalties*."

Lord HARDWICKE states the Doubt to be, "Whether the Statute was *declaratory of the Common Law, or introductory of a new Law, to give learned Men a Property which they had not before*" He states no Doubt, "Whether any Remedy could lie, except for the Penalties only, if the Act gave a new Property."

The Doubt was a Question of *Construction* upon the Statute, not to be solved by the Words; for there are no Words declaratory of the Common Law: And there is an express Proviso against *Inferences* either Way.

The Question depended upon settling "whether the Property existed by the Common Law." If it did, the Act confirms the Right, and secures it by Penalties. If there was no Right at the Common Law, then the Act gives a new Right upon Condition, under a Sanction specially prescribed. Therefore, says Lord HARDWICKE, it is material to consider "How the Common Law of Scotland stood, before the Statute."

As to what he is reported to have said of the Relief given in Chancery—The Solicitor has certainly omitted something.

Lord HARDWICKE could never ground the Relief given to a Patentee, merely upon the Patent being *inrolled in Chancery*: Much less could he argue from thence to an Act of Parliament, merely because it was a Record of a higher Nature; without saying a Word as to the *Construction* of the Act, upon which the Court of Chancery proceeded; though that was the *only* Thing material, and relied upon in the Argument as *decisive*.

The printed Reasons argued from the Relief given upon Patents for new Inventions, by Action or Bill, as a parallel Case.

Supposing a Common Law Property secured and confirmed by the Statute for a Term; this legal Right stands upon the same Ground with the legal Right excepted in the Act of 22 Jas. 1. But supposing the Privilege given to Authorities by this Act, to arise out of a new Prohibition: there is no Colour, from the Case of *Letters Patent*, for the Jurisdiction exercised by the Court of Chancery upon 8 Ann.

In *Letters Patent*, all the Conditions required by 21 *Jac.* 1. must be observed. Patentees for new Inventions are left, by that Statute, to the Common Law, and the Remedies which follow the Nature of their Right.

But this Statute of the 8th of Queen *Ann*, is a *penal Statute*; which prescribes the Remedy for the Party aggrieved, and the Mode of Prosecution, to be commenced within Three Months. Upon such an Act, if the Offence, and consequently the Right which arises from the Prohibition, be *new*, no Remedy or Mode of Prosecution can be pursued, except what is directed by the Act.

The Statutes which prohibit Interlopers, give, by that Prohibition, the sole *East India Trade* to the Company. The Trade was free before. Consequently, the Statutes create a *new Offence*. Was it ever imagined that any Remedy could be pursued by the Company, except those prescribed by the Statutes?

Where an Act enforces a Duty with Penalties, the ordinary Remedies follow the *Debt of Obligation to pay*; and the Penalties are by Way of Security. But where the Privilege to one Person arises out of and consists in a *new Prohibition to Others*, there is no Proceeding but for Breach of the Prohibition. If the Act has prescribed the Remedy for the Party grieved, and the Mode of Prosecution; all other Remedies and Modes are excluded.

If a conditional Right is created by an Act of Parliament, the Condition can not be dispensed with. If the same Act, which creates the Right, limits the Time within which Prosecutions for Violation of it shall be commenced, that Limitation can not be dispensed with.

Therefore the whole Jurisdiction exercised by the Court of Chancery since 1710, against Pirates of Copies, is an Authority " That Authors had a Property antecedent; to which the " Act gives a temporary additional Security: It can stand upon no other Foundation. And I am persuaded Lord Hardwick dropt something as to the Reasons and Grounds of the Relief given by the Court of Chancery, in consequence of this Act; which occasioned his repeating, more than once, " that he would be still open to all Reasonings " upon the Subject."

The Order declares, " That the Action brought by the Appellants in the Court of Sessions in Scotland was improper and inconsistently brought, by demanding at the same Time a Discovery and Account of the Profits of the Books in

" in Question, and also the Penalties of the Acts of Parliament, (which the Appellants had never absolutely waived in the Proceedings below;) and also by joining several Pursuers, claiming distinct and independant Rights in different Books, in the same Action; and that therefore the Points determined by the said Interlocutors could not regularly come in Question in this Cause: And therefore ORDERED and ADJUDGED that the several Interlocutors be reversed, without Prejudice to the Determination of any of the said Points, when the same shall properly be brought in Judgment. And it is hereby also declared, that Libel in this Cause is nonrelevant: And ordered, that the said Court of Session do proceed accordingly."

If the Ground of the Relief in Chancery during the Continuance of the Term given by the Act, was the antecedent Property; it is not to be wondered, that after the Expiration of the Term, the Court had no Difficulty to grant the same Relief, merely upon the Common Law Right.

But before I mention the Cases, it may be proper to premise what will put the Authority of them in its true Light.

Injunctions to stay printing or the Sale of Books printed, are in the Nature of Injunctions to stay Waste: They never are granted, but upon a clear Right. If moved for, upon filing the Bill; the Right must appear clearly, by Affidavits: If continued, after the Answer put in; the Right must be clearly admitted by the Answer, or not denied.

Where the Plaintiff's Right is questioned and doubtful, an Injunction is improper; because no Reparation can be made to the Defendant for the Damages he sustains from the Injunction: But if the Defendant proceeds to commit the Waste or Injury, the Plaintiff may afterwards have Compensation.

Few Bills against Pirates of Books are ever brought to a Hearing. If the Defendant acquiesces under the Injunction, it is seldom worth the Plaintiff's while to proceed for an Account; the Sale of the Edition being stopped.

From the Year 1709 to this Day, there have not been more than two or three such Causes heard.

The Question upon the Common Law Right, could not arise till 21 Years from the 10th of April 1710, for old Copies: Consequently, the soonest it could arise was after the 10th of April 1731.

On

On the 9th of June 1735, in the Case of *Eyre v. Walker*, Sir Joseph Jekyll granted an Injunction to restrain the Defendant from printing the Whole Duty of Man; the first Assignment of which * had been made in December 1657: And this * Dr. Ham-

mond's Letter to the Booksellers.

In the Case of *Motte v. Falkner*, 28th November 1735, an Injunction was granted for printing Pope's and Swift's Miscellanies. Many of these Pieces † were published in 1701, † 1701, 1702, 1708: And the Counsel strongly pressed the Object Contests on, as to these Pieces. Lord Talbot continued the Injunction, as to the Whole: And it was acquiesced under. Yet sions between A-Falkner, the Irish Bookseller, was a Man of Substance; and thens and the general Point was of Consequence to him: But he was Rome. not advised to litigate further.

1707, Productions for

1708. 1708, Partridge's Death. 1708, Sentiments of a Church of England-Man. Vanbrugh's House. Baucis and Philemon. 1709, Project for Advancement of Religion, and Reformation of Manners.

On 27th January 1736, in the Case of *Walthoe v. Walker*, an Injunction was granted by Sir Joseph Jekyll, for printing Nelson's Festivals and Fasts; though the Bill sets forth, that it was printed in the Lifetime of Robert Nelson the Author ‡, ‡ It was and that he died in January 1714*. This too was acquiesced under.

1703.
* Pre-cut
Preface.

On 5th May 1739, in the Case of *Tonson et al v. Walker otherwise Stanton*, before Lord Hardwicke, an Injunction was granted to restrain the Defendants from printing Milton's *Paradise Lost*. The Plaintiffs derived their Title under an Assignment of the Copy from the Author in 1667; which was read. This Injunction was also acquiesced under.

In the Case of *Tonson v. Walker and Merchant* †, before Lord Hardwicke, the Bill was filed 26th November 1751, 1752. suggesting that the Defendants had advertised to print "Milton's Paradise Lost, with his Life by Fenton; and the Notes of all the former Editions," of which Dr. Newton's was the last. The Bill suggests a Pretence "that the Defendants had a Right." It derives a Title to the Poem, from the Author's Assignment in 1667. That it was published about 1668. And it derives a Title to his Life by Fenton, published in 1727; and to Lentley's Notes, published in 1732; and Dr. Newton's, in 1749. The Answer came in the 12th December 1751: Wherein the Defendants insisted they had a Right to print their Work in Numbers, and to take in Subscriptions. And they put in their Answer so expeditiously, as to prevent an Injunction before Answer.

It was intended to take the Opinion of the Court solemnly. The Searches and Affidavits, which were thought necessary

to be made, occasioned a Delay : And no Motion was made till near the End of April 1752.

The Injunction was moved for, on Thursday the 23d of April, Lord MANSFIELD argued it. It was argued at large, upon the general Ground of *Copy-Rights* at Common Law.

Lord CHANCELLOR directed it to proceed on the Saturday following ; and to be spoken to by One of a Side. Afterwards, it stood over, by Order, till Thursday the 30th of April; when it was argued very diffusively.

The Case could not possibly be varied, at the Hearing of the Cause. The Notes of the last Edition (Dr. Newton's) were *within* the Act: But an Injunction as to *them only*, would have been of little Avail ; and it did not follow, that the Defendants should not be permitted to print what they had a Right to print ; because they had attempted to print more. For, in the Case of *Pope v. Cull*, 5th June 1741, Lord Hardwicke enjoined the Defendant only from printing and selling the Plaintiff's Letters : There were a great many more in the Book which the Defendant had printed, which the Plaintiff had no Right to complain of.

If the Inclination of Lord Hardwicke's own Opinion had not been strongly with the Plaintiff, he never would have granted the Injunction to the Whole, and penned it in the *Disjunctive*; so that printing the Poem, or the Life, or Bentley's Notes, without a Word of Dr. Newton's, would have been a Breach.

The Injunction is not barely to the Selling of *that* Book, of which Newton's Notes made a Part ; but to *future printing*.

He might have sent it to Law then, as well as at the Hearing: But he probably foresaw he never should hear of it again. Accordingly, the Parties understood his Way of thinking : And the Defendants acquiesced under the Injunction, and so have made it perpetual ; and would now be guilty of a Breach, if they printed *Milton*.

I do admit that (except from the Order he made, which he saw and penned,) he guarded against being thought finally to determine the Question.

He cited *The Stationers Company v. Partridge*, as an Authority for an Injunction, where the Right was *doubtful*. He observed upon Dr. Newton's Notes, either transcribed or colourably abridged, being within the Act : And, according to a Note I have of the Case, he said, "The strongest Authority

" thority is what the Judges have said in the Case of *Seymour*
 " (1 Mod.) and in the Argument of Prerogative-Copies.
 " Distinctions are taken upon the Ground of the King's Pro-
 " perty in *Bibles, Latin Grammars, Common-Prayer* and
 " *Year-Books*; that they were made and published at the
 " *Expence of the Crown: ergo the King's Property*. These
 " Arguments being allowed to support that Right, infer
 " such a *Property existing.*"

The very Point was then depending in this Court, upon a Case sent by himself, in *Baskett v. The University of Cambridge*.

It would not have been agreeable to Lord Hardwicke's great Decency and Prudence, to have spoken out *decisively*, upon a general *legal Right never decided at Law*; and to have grounded his Opinion upon an Argument which was then a Question *sub Judice*.

The Question upon Literary Property was brought before this Court in the Case of *Tonson v. Collins*; and after two Arguments, was adjourned into the Exchequer-Chamber. I have been informed, from the best Authority, that so far as the Court had formed an Opinion, they all inclined to the Plaintiff. But as they suspected that the Action was brought by Collusion; and a nominal Defendant set up, in order to obtain a Judgment, which might be a Precedent against third Persons; and that therefore a Judgment in Favour of the Plaintiff would certainly have been acquiesced in; Upon *this Suspicion*, and because the Court inclined to the Plaintiff, it was ordered to be heard before *all* the Judges.

Afterwards, upon certain Information received by the Judges, " that the whole was a Collusion; that the Defendant " was *nominal only*; and the *whole Expence* paid by the " Plaintiff;" they refused to proceed in the Cause; though it had been argued *bondâ fide*, and very ably, by the Counsel, who appeared for the Defendant. They thought, this Contrivance to get a collusive Judgment was an Attempt of a dangerous Example, and therefore to be discouraged.

The Pendency of this Cause was publicly known: But the Reason of its Discontinuance was not.

Whilst this Question hung in *thi. Court*, a Doubt arose in Chancery: And in the Cases of *Mil'ar v. Donaldson*, and *O'-borne v. Donaldson*, * the Injunction was refused, without any * Trinity Opinion given. Mr. Murphy stated Lord *Northington* to have Vacation, said—" It would be Presumption in Me: Therefore I shall 1765, " say Nothing as to the Merits."

Under

Under these Circumstances, I think the Injunction was rightfully refused : For, whatever his Lordship's own Opinion might be, either Way, it was a becoming Decency, "to doubt." And no Judge ever granted such an Injunction to stay Waite, upon a legal Property, and continued it to the Hearing ; where the whole Fact was admitted upon the Motion, and he in his own Mind doubted of the Plaintiff's Right. To what End should an Injunction be granted ? Since the Matter can not appear in a different Light at the Hearing : And it may be sent to Law directly. To stay the Defendant from making a Profit, which he may probably be intitled to, is unjust.

*5th Feb. The Stationers Company v. Partridge, for printing Almanacs, is no Instance to the Contrary. *Lord Cowper continued the Injunction to the Hearing, upon Grounds which R. Lucas 105. he might think bound him to consider the Plaintiff's legal † Stationers Right to be clear. Their Patent for printing Almanacs had Company v. been tried at Law, and adjudged for them : Injunctions had Lee, 15 No- been decreed in † Chancery ; and any further Trial at Law vember. 1681. refused, upon solemn Argument. Had not Lord Cowper in- 2 Show. clined strongly for the Plaintiffs, he never would have enjoined 258. Stati- a Work which is annual, and serves only for One Year. oners Com-

pany v. There is no Report of what passed on the Motion before Wright, 17 Lord Cowper. But the Question founding in prerogative ; Nov. 1681. and the former Determinations having been before the Revolution † 2 Febru- ; Lord Harcourt thought it prudent to make a Case ary, 1710. for the Opinion of this Court.

Lucas 105.

No Judgment at Law as to this Case : But the Injunction granted by Lord Cowper remained. Lord Parker seemed, on the Argument, to think "that the Calendar was "not Part of the Common-Prayer Book."

These Cases in 1765 add great Weight to the Precedents where Injunctions have been granted after the Expiration of the Term ; because they shew that there was no Doubt before. And I am persuaded that if, in 1752, the Question had been depending in this Court, Lord Hardwicke would not have granted the Injunction in the Case of Tonson v. Walker ; how strong so ever his own Opinion might have been.

Lord Hardwicke laid great Stress on the Argument made Use of to support Crown-Copies ; as presuming the Property of Authors. That Argument has since prevailed : And it has been since solemnly adjudged, "that there are Copies of "which the King is Proprietor."

This

This Court had no Idea that the King; by *Prerogative*, had any Power to *restrain* Printing, which is a Trade and Manufacture ; or to grant an *exclusive* Privilege of printing any Book whatsoever ; except as a Subject might, by Reason of the Copy being *his Property*.

The Court agreed with Mr. Justice *Powell*, who said, in the Case of *The Stationers Company v. Partridge*, " You must shew some *Property in the Crown*, and bring it with- in the Case of the *Common Prayer Book*." Mr. *Yorke* argued it upon this Ground.

It is settled, then, " that the King is *Owner* of the Copies of all Books or Writings which he had the *sole Right originally to publish*; as *Acts of Parliament, Orders of Council, Proclamations, the Common-Prayer Book*." These and such like are his *own Works*, as he represents the State. So likewise, where by *Purchase* he had the Right *originally to publish*; as the *Latin Grammar*, the *Year-Books*, &c. And in these last Cases the Property of the *Crown* stands exactly on the same Footing as *Private Copy-Right*: As to the *Year-Books*, because the *Crown* was at the *Expence* of taking the Notes; and as to the *Latin Grammar* because it paid for the Compiling and Publishing it.

The Right of the *Crown* to these Books is independent of every *Prerogative* Idea.

The *only Doubt*, as to the Judgment of the House of Lords, upon *Roll's Abridgment* and *Croke's Reports*, is, " that *neither Collection* was made by the *Authority*, or at " the *Expence* of the *Crown*;" and " that the King had no " Right of *Original Publication*; the *Courts of Westminster-Hall* having the *sole Power* to authorize and authenticate " the *Publication* of their *own Proceedings*.

In the Case of *Manley et al. v. Owen et al.* 8th of April, 1755, a Bill was filed by some Printers, who had bought from the Lord Mayor the Copy of the Sessions Paper, to injoin the Defendants from printing it. The Lord Chancellor went fully into it, upon Affidavits of the Purchase, and Authority from the Lord Mayor; and that it had always been usual for the Lord Mayor, (being first in the Commission,) to appoint the Printer of the Trials, and to take a Confederation for it. The Lord Chancellor thought the *Right to print* gave the Plaintiff the *Property*; and granted an Injunction : Which was acquiseuced under.

If an Author, by the Common Law, has the sole Right to make the first Impression and Publication, I can not distinguish his Case from Crown-Copies, or Copies analogous to the *Suffolk-Paper*; as Votes of the House of Commons, or Trials published by Authority.

Suppose a Man, with or without Leave to peruse a Manuscript Work, transcribes and publishes it; it is not within the Act of Queen Anne; it is not Larceny; it is not Trespass; it is not a Crime indictable; (The physical Property of the Author, the original Manuscript remains;) But it is a gross Violation of a valuable Right.

Suppose the Original, or a Transcript, was given or lent to a Man to read, for his own Use; and he publishes it; It would be a Violation of the Author's Common Law-Right to the Copy. This never was doubted; and has often been determined.

In the Case of *Webb v. Rose*, 24th of May, 1732, a Bill was filed by the Son and Devisee of Mr. Webb the Conveyancer, against the Clerk, for intending to print his Father's Draughts. Sir Joseph Jekyll granted an Injunction: and it was acquiesced under.

In the Case of *Pope v. Cull*, 5th of June, 1741, Lord Hardwicke, upon Motion, granted an Injunction as to Pope's Letters to Swift: And the Point was fully considered. Lord Hardwicke, thought, " sending a Letter transferred " the Paper upon which it was wrote, and every Use of " the Contents, EXCEPT the Liberty and Property of Publishing."

When express Consent is not proved, the Negative is implied as a tacit Condition.

In this Case too, the Injunction was acquiesced under.

In the Case of *The Duke of Queensbury v. Shebbeare*, 31st of July, 1758, an Injunction was granted, for printing the second Part of Lord Clarendon's History. Lord Clarendon, the Son, let Mr. Francis Gwyn have a Copy. His Son and Representative insisted " he had a Right to print and publish," The Court was of Opinion " that Mr. Francis Gwyn might " make every Use of it, except the Profit of multiplying in " Print." It was to be presumed, Lord Clarendon never intended that, when he gave him a Copy. The Injunction was acquiesced under: And Dr. Shebbeare recovered, before Lord Mansfield, a large Sum against Mr. Gwyn, for representing " that he had a Right to print."

In the Case of *Mr. Forrester v. Waller*, 13th of June, 1741, an Injunction, for printing the Plaintiff's Notes, gotten surreptitiously, without his Consent, was granted.

From hence, it is clear, that *there is a Time*, when without any positive Statute, an Author, has a *Property* in the Copy of his own Work, in the *legal Sense* of the Word, *Id quod nostrum est, sine nostro Facto, ad Alterum transferri non potest. Facti autem Nomine, vel Consensus, vel etiam Delictum intelligitur.*

In this Case, the Author has asserted his Property in the Copy, from the first Moment. *Consent* to leave it open, or give it to the Public, whether express or implied, is a *Fact*: It is not pretended here.

But the Defendant's Counsel insist, "that by the Author's " Sale of printed Books, the Copy necessarily becomes open; " in like Manner as by the Inventor's communicating a " Trade, Manufacture or mechanical Instrument, the Art " becomes free to all who have learnt, from such Commu- " nication, to exercise it."

The Resemblance holds only in this.—As by the Communication of an Invention in Trade, Manufacture or Machines, Men are taught the *Art or Science*, they have a *Right to use it*; so all the *Knowledge*, which can be acquired from the *Contents of a Book*, is *free for every Man's Use*: If it teaches Mathematics, Physic, Husbandry; If it teaches to write in Verse or Prose; If, by reading an Epic Poem, a Man learns to make an Epic Poem of his Own; he is at *Liberty*.

But PRINTING is a *Trade or Manufacture*. The Types and Press are the *mechanical Instruments*: The *literary Composition* is as the *Material*; which always is *Property*. The Book conveys *Knowledge, Instruction, or Entertainment*: But multiplying Copies in Print is a quite distinct Thing from all the Book communicates. And there is no Incongruity, to reserve that Right; and yet convey the *free Use* of all the Book teaches.

In 43 Eliz. and 21 Jac. 1, when Monopolies were the Subject of much Discussion, Copies of *Literary Works* were protected; and never thought to be like a *Trade, Manufacture, or mechanical Instrument*.

But if the Copy necessarily becomes open, as a *Gift to the Public*, by the Printing and Publication; it must likewise be so, as to *Crown-Copies*: The Contrary of which is now settled.

I can not distinguish between the *King*, and a *Author*. I disclaim any Idea that the *King* has the least Control over the Press, but what arises from his *Property in his Copy*.

I am bound by the Opinion of the Court in *Baskett v. University of Cambridge*, to say " that the first Publication and Sale does not, by the Common Law, necessarily, and in Spite of the *Author*, make his Copy open : Though I admit, " an Author's Consent to leave it open may be implied from Circumstances."

2d Question. It remains, to consider the second Question, upon the 8th of Queen *Ann*; though I have already, in Part, anticipated the Argument.

Mr. Murphy strongly contended, from the Amendments in the Committee of the House of Commons, and from the Change of the Title, " that the Parliament meant to take away, or to declare there was no *Property at the Common Law*."

The Sense and Meaning of an Act of Parliament must be collected from what it says when passed into a Law ; and not from the History of Changes it underwent in the House where it took its Rise. That History is not known to the other House, or to the Sovereign.

Upon the Face of this Act, the very Preamble strongly implies a Declaration of the *Property at the Common Law*, For, it speaks thus—" Whereas of late," (that is, since the Determination of the Licensing Act,) " the Liberty taken by divers Persons, of printing, re-printing, and publishing Books without the Consent of the Authors or Proprietors, to their very great Detriment, and too often to the Ruin of them and their Families ;" For preventing, therefore, such Practices for the future, &c.

Now, every Word, almost, in this Preamble is emphatical, and deserves to be remarked upon.

When the Legislature speak of a " *Liberty taken*," could they mean a Claim founded on any *Right*? If they had, they would certainly have so expressed themselves : And then, probably, the Preamble would have run thus—" Whereas Booksellers and divers other Persons have of late claimed the *Right of Printing and Re-printing*, &c."

Now the Word " *Re-printing*" is also observable. For, if the first Printing or Publication was a *Gift* of the Work to the Public, it could be no *Injury* to re-print a *second Edition without*

without Consent. But without Consent of Whom? The “Author or Proprietor,” (in the *disjunctive*;) Thereby clearly pointing out *what Sorts of Persons* are intitled to this Property; the original Author, or his *Assigns*, become also the Proprietor, either by Assignment (in Case of a private Person,) or by Grant from the Crown.

I might, without straining the Construction, suppose that by the Words “too often to the *Ruin* of them and their *Families*,” the Parliament *might allude* to Dispositions made by Authors, of their Works, at their Decease, for the Maintenance and Benefit of their Families.

But I choose rather to go to the first Words of the *enacting Clause*—“*For preventing, therefore, the like Practices for the future.*”

Did the Parliament, by the Word “*Practices*,” mean to describe the Exercise of a *legal Right*? (which the Publication of Books would be, if there was no Copy Right) or did they mean to point out Acts committed in Fraud and *Violation of private Rights*; which this Act was *made to prevent*, and which are properly styled *Practices*?

The Word “*Practices*;” is properly applied to the doing of *illegal Acts*; but is improperly and incongruously made Use of to describe the Exercise of *Right*, either strictly legal, or even doubtful.

The Preamble is infinitely stronger in the original Bill, as it was brought into the House, and referred to the Committee.

But to go into the History of the Changes the Bill underwent in the House of Commons—It certainly went to the Committee, as a Bill to *secure the undoubted Property of Copies for ever*. It is plain, that Objections arose in the Committee, to the *Generality* of the Proposition: Which ended in securing the Property of Copies for a *Term*; without Prejudice to either Side of the Question upon the *general Proposition* as to the *Right*.

By the Law and Usage of Parliament, a *new* Bill can not be made in a *Committee*: A Bill to *secure* the Property of Authors could not be turned into a Bill to *take it away*. And therefore this is not to be supposed, though there had been *no* Proviso saving their Rights.

What the Act gives with a Sanction of Penalties, is for a *Term*: And the Words “*and no longer*,” add nothing to the Sense; any more than they would in a Will, if the Testator gave

gave for Years. Yet, probably, these Words occasioned the express Proviso being afterwards added; from the Anxiety of the University-Members, who knew the Universities had many Copies. The University of *Oxford* had published Lord *Clarendon's History* in Three Volumes, but about Five Years before; and had the Property of the Copy.

Great Stress has been laid by the Counsel for the Defendant, upon the *Change of the Title*, and the Word “*vesting*,” being used instead of the Word “*Securing*”

The Restraining of the Provisions of the Bill to a *Term*, necessarily occasioned an Alteration in the Title. “*Securing* “for a *Term*” would not import that there was a Common-Law Right beyond the Term: And “*Vesting* for a *Term*” does not import that there is no Common-Law Right. If it did, the Title is but once read; and, if there had been no Proviso, could not control the Body of the Act, which speaks (in the Preamble to the second Section) of the Property intended to be thereby *secured* to the Proprietor. But the Proviso saving the ancient Common-Law Right, is as full as could be drawn—“ Provided, that nothing in this Act “contained shall extend, or be construed to extend, either “to prejudice or confirm any *Right* that the said Universities “or any of them, or any *Person* or *Persons* have, or claim “to have, to the printing or re-printing any Book or Copy “already printed, or hereafter to be printed.” What was the Right to be saved, either as to Books *already* printed, or much more as to Books *hereafter* to be printed, but the *Common-Law* Right?

WITHOUT this Proviso, it might fairly have been argued, that there is nothing in this Act which can prejudice the Property of Authors in the Copy: And every Adjudication upon the Act since it has passed, is an Authority that there never was an Idea that this Act had decided against the Property of Authors at Common Law.

I have avoided a large Field which exercised the Ingenuity of the Bar. Metaphysical Reasoning is too subtle: And Arguments from the supposed Modes of acquiring the Property of Acorns, or a vacant Piece of Ground in an imaginary State of Nature, are too remote. Besides, the Comparison does not hold between Things which have a physical Existence, and incorporeal Rights.

It is certainly not agreeable to natural Justice, that a Stranger should reap the *beneficial pecuniary Produce* of another

other Man's Work. *Jure Naturæ æquum est, Neminem cum Alterius Detimento et Injuria fieria locupletiorem.*

It is wise in any State, to encourage Letters, and the painful Researches of learned Men. The easiest and most equal Way of doing it, is, by securing to them the Property of their own Works. Nobody contributes, who is not willing: And though a good Book may be run down, and a bad One cried up, for a Time; yet sooner or later, the Reward will be in Proportion to the Merit of the Work.

A Writer's Fame will not be the less, that he has Bread, without being under the Necessity of prostituting his Pen to Flattery or Party, to get it.

He who engages in a laborious Work, (such, for Instance, as *Johnson's Dictionary*,) which may employ his whole Life, will do it with more Spirit, if, besides his own Glory, he thinks it may be a Provision for his Family.

I never heard any Inconvenience objected to Literary Property, but that of *enhancing the Price of Books*. This Judgment will not be a Precedent in Favour of a Proprietor who is found by a Jury to have enhanced the Price. An Owner may find it worth while to give more correct and more beautiful Editions; which is an Advantage to Literature: But his Interest will prevent the Price from being unreasonable. A *small Profit*, in a *speedy and numerous Sale*, is much larger Gain, than a *great Profit upon each in a slow Sale of a less Number*.

Upon these Reasons, I am of Opinion, that there is a *Common-Law Right* of an Author to his Copy; that it is not taken away by the Act of the 8th of Queen Ann; and that Judgment ought to be for the Plaintiff.

Mr. Justice ASTON—This Case has been so often, so fully, and so ably argued; the Citations from History, Decrees, Ordinances, Statutes and Precedents in *Westminster-Hall*, have been stated so accurately in Point of Time and Substance; and the whole Arguments have been gone into so largely by my Brother Willes; That I shall content myself with alluding to them, as now fully and precisely known, without stating any of them over again (at large,) which I shall have Occasion to take Notice of.

The great Question in this Cause is a General One: "How
" the Common-Law stands, independant of the Statute of 8
" Ann.

" 8 Ann. in respect to an Author's sole Right to the Copy of
" his Literary Productions."

The material Facts to introduce that Question, found by the special Verdict, are—That the Book intitled "The " Seasons," was an Original Composition by James Thomson; That it was printed and published by him for his own Use; as the Proprietor thereof, at several Times, from the Beginning of the Year 1727, to the End of the Year 1729; and was never before printed elsewhere.

That the Plaintiff, in 1729, purchased this Work of the original Author and Proprietor for a valuable Consideration; that the Plaintiff has from that Time printed and sold this Work as his Property; and has ever had a sufficient Number of the said Work, for Sale, at a reasonable Price.

That the Defendant, without the Plaintiff's Licence or Consent, has published and sold several Copies of this Work, which were printed without the Plaintiff's Consent. So, taking it affirmatively and negatively, it is expressly found "That it " was printed without his Consent:" And it is not found, "that it was ever made common, or given to the Public." Therefore there is no Room for implying a Consent, by any Arguments whatsoever.

By this Verdict, then, the original Property in this Work, and Publication of it by the Author; his transferring it to the Plaintiff; the Identity of the Work, and of the Copy, (which expressly makes Use of the Name of the Author, and purports to be his Work;) and its Continuing in the Author and the Plaintiff respectively, uninterrupted, down to the Defendant's Invasion of that Property, is found.

The Questions therefore are—(1st.) "Whether an Author's " Property in his own Literary Composition is such as will " intitle him, at Common Law, to the sole Right of multi- " plying the Copies of it;" Or (2dly,) supposing he has a " Property in the Original Composition,, " Whether the " Copy-Right, by his own Publication of the Work, is ne- " cessarily GIVEN away, and his Consent to such Gift implied " by Operation of Law, manifestly against his Will, and " contrary to the Finding of the Jury; Or (3dly,) TAKEN " away from him, or restrained, by the Statute of Queen " Ann."

It has been ingeniously, metaphysically and subtilly argued on the Part of the Defendant, "That there is a Want of " Property in the Thing itself, wherein the Plaintiff sup- " poses

" poses himself to be injured ; and consequently, if there is
 " no Property of Right, there is no Injury or Privation of
 " Right."

The Plaintiff's supposed Property has been treated as quite ideal and imaginary ; not reducible to the Comprehension of Man's Understanding ; not an Object of Law, nor capable of Protection.

As all the Objections to this Property or Right being allowed or protected by the Common Law, rest entirely upon Arguments which endeavour to shew " that such Allowance or Protection is contrary to right Reason and natural Principles," the only Grounds of Common Law originally applicable to this Question ;—I think it fit (however abstract they may seem) to consider certain great Truths and sound Propositions ; which we, as rational Beings ; we, to whom Reason is the great Law of our Nature ; are laid under the Obligation of being governed by ; and which are most ably illustrated by the learned Author of The Religion of Nature Delineated ; that is to say—

" That Moral Good and Evil are coincident with Right and Wrong :" For, that can not be good, which is wrong ; nor that evil which is right *. " That right Reason is the * P. 20. § 1. great Law of Nature ; by which, our Acts are to be adjudged ; and according to their Conformity to this, or Deflexion from it, are to be called lawful, or unlawful ; good, or bad. † " That whatever will bear to be tried † P. 23. § 5. by that Reason, is right ; and that which is condemned by P. 126. it is wrong ‡." " That to act according to right Reason, ‡ P. 23. and to act according to Truth, are in Effect the same Thing §." § Ibid.

Then (speaking of Truths respecting Mankind in general, * P. 127 §. antecedent to all human Law*) " That Man being capable of distinct Properties in Things which he only, of all Mankind, can call his ;" he says—

" The Labour of B. can not be the Labour of C; because it is the Application of the Organs and Powers of B, not of C, to the Effecting of something : And therefore the Labour is as much B's as the Limbs and Faculties made use of are his.

Again, " The Effect or Produce of the Labour of B is not the Effect of the Labour of C : And therefore this Effect or Produce is B's, not C's. It is as much B's as the Labour was his, not C's ; because, what the Labour of B causes or produces, B produces by his Labour ; or it is the Product of his Labour. Therefore it is his ; not C's or any Other's.

" And

^{† P. 127,} “ And if *C* should pretend to any *Property* in that, which *B* ^{125:} “ only can truly call *his*, he would act contrary to the Truth.”

“ That to deprive a Man of the Fruit of his own *Cares* and *Sweat*; and to enter upon it,” [he is here speaking of the Cultivation of *Lands*,] “ as if it was the Effect of the *Intruder’s* Pains and Travel; is a most manifest Violation of Truth: It is asserting, in Fact, that to be *his*, which

^{‡ Prop. 8. §} “ can not be *his*. †.”

^{6. P. 134.}

There is, then, such a Thing as *Property in Nature and Truth*; or there are Things, which One Man only can, consistently with Nature and Truth call *his* §: As Proposition 2, § 6 Pa. 136. 8, 9, demonstrate.

And those Things, which only one Man can truly and properly call *his*, must remain *his*, till he agrees to part with them by *Compact* or *Donation*: Because no Man can deprive him of them without his *Approbation*; but the *Depriver* must use them as *his*, when they are not *his*, in Contradiction to Truth. For, “ to have the *Property*” of any Thing, and “ to have the sole *Right* of using and disposing of it,” are * Pa. 136. the same Thing: They are equipollent Expressions*.

Property, without the Use, is an empty Sound. He who uses or disposes of any Thing, does by that declare it to be *his*; because this is all that he whose it really is, can do. Borrowing and Hiring afford no Objection to this: For he uses what is *his own* for the Time allowed; and his doing so is only in One of those Ways, in which the true Proprietary disposes of it. †

^{† P. 137.}

FROM this Great Theory of *Property*: It is to be collected—

That a Man may have *Property* in his *Body, Life, Fame, Labours*, and the like; and, in short, in any Thing that can be called *his*. That it is incompatible with the *Peace and Happiness of Mankind* to violate or disturb, by Force or Fraud, his Possession, Use or Disposal of those Rights; as well as it is against the Principles of *Reason, Justice and Truth*. That it is what every Man would think unreasonable in his own Case. That a partial Disposition, by the true Proprietor, of a Thing that is *his*, is not to be carried beyond the Intent and Measure of the Proprietor’s Assent and *Approbation* in that Behalf; whether it be the Case of borrowing, hiring, or a Compact of any other Sort: Of which I shall take further Notice, when I speak of *Publication* †.

^{‡ Post. 2342.}

I shall in the next Place observe, That the written Definitions of *Property*, which have been taken Notice of at the Bar, are, in my Opinion, very inadequate to the Objects of Pro-

erty at this Day. They are adapted, by the Writers to Things in a primitive (not to say *imaginary*) State; when all Things were in *common*; when the common Right was to be *devested* by some Act to render the Thing privately and *exclusively* a Man's own, which, before that Act so done to separate and distinguish it, was as much *Another's*.

These Definitions too, when examined, will be found principally to apply to the *Necessaries of Life*, and the greater Objects of Dominion, which the immediate natural Occasions of Men called for: And for that Reason, the Property, so acquired by Occupancy, was required to be an Object *useful to Men*, and capable of being *fastened on* §. Enough was to be left for Others. As much as any One could use to an *Advantage* before it spoiled, so much he could fix a Property §. Pufendorf, Vol. 2. c. 5.
in: Whatever was beyond this, was more than his Share, and belonged to Others*. 'Tis plain too, that the Definition is so understood by Grotius†, when he says " *Tus in Res* *Locke, Vol. 2.
" *inferioris Naturæ Deus humano Generi indivisim contulit:* Brooke 2. c. 25. §27 31.
" *binc factum, quod quisque Hominum ad suos Usus arripare* †Lib. 2. §2.
" *poffet, quod vellet; et quæ consumi poterant, consumere."*

'Tis evident, surely, that these Definitions give a Sort of Property little superior to the legal Idea of a Beast-Common,—the Bit of Mouth snatched or taken for necessary Consumption to support Life.

Thus Great Men, ruminating back to the *Origin of Things*, lose Sight of the present State of the World; and end their Inquiries at that Point where they should begin our Improvements.

But *distinct Properties*, says Pufendorf‡, were not settled at Lib. 4. c. the same Time, nor by one single Act, but by successive Decrees; nor in all Places alike: But Property was gradually introduced according either as the Condition of Things, the Number and Genius of Men required; or as it appeared requisite to the common Peace.

SINCE those supposed Times, therefore, of universal Communion, the Objects of Property have been much enlarged, by Discovery, Invention, and Arts.

The Mode of obtaining Property by Occupancy has been abridged; and the Precept "of abstaining from what is *Another's*," enforced by Laws.

THE RULES attending Property must keep Pace with its Increase and Improvement, and must be adapted to every Case.

A DISTINGUISHABLE Existence in the Thing claimed as Property : an ACTUAL VALUE in that Thing to the true Owner ; are its essentials ; and not less evident in the present Case, than in the immediate Object of those Definitions.

And there is a material Difference in Favour of this Sort of Property ; from that gained by Occupancy ; which before was common, and not yours ; but was to be rendered so by some Act of your Own, For THIS is originally the Author's : And, therefore, unless clearly rendered common by his own Act and full Consent, it ought still to remain his.

The UTILITY of the Thing to Man, required by the Definition || to make it an Object of Property, has been long Lib. 4. c. 5. exploded; as appears from Barbeyrac's Note upon this very Pa 378. Passage; where it is held an unnecessary and superfluous Condition.

Things of Fancy, Pleasure or Convenience are as much Objects of Property : and so considered by the Common Law ; Monkeys, Parrots, or the like ; in short any Thing merchandizable and valuable. 12 H. 8. 3. a. b. &c. Bro. Abr. Tit. "Property," pl. 44. Comyns Digest, 1 Vol. pa. 602.

The best Rule both of Reason and Justice, seems to be, "to assign to every Thing capable of Ownership, a legal and determinate Owner."

For, the Capacity to fasten on, as a Thing of a Corporeal to fasten on, Nature, being a Requisite to every Object of Property, plainly not the true partakes of the narrow and confined Sense in which Property only Definition has been defined by Authors in the original State of Things. But, A Capacity TO BE DISTINGUISHED answers every End of A Capacity Reason and Certainty ; which is the great Favourite of the Law, and is all that Wisdom requires to secure their Possessions and profits to Men, and to preserve the Peace.

It is settled and admitted,† and is not now controverted, Pope v. Cull. Webb but " that Literary Compositions, in their original State, and v. Rose Ld. " the Incorporeal Right of the Publication of them, are the Clarendon's " private and exclusive PROPERTY of the Author; and that Works. " they may ever be retained so ; and that if they are r- Forrester v. " wished from him before Publication, Trover or Trespass Waller. D. " lies." of Queen- bury v. Shakespeare,

I should

I should be glad to know, then, in such a Case where the Property is admitted, “*How the Damages* ought to be estimated by a Jury?”—Should they confine their Consideration to the Value of the *Ink and Paper*?—Certainly not: It would be most reasonable, to consider the known Character and Ability of the Author, and the Value which his Work (so taken from him) would produce by the Publication and Sale. And yet, *What* could that *Value* be, if it was true, that the Instant an Author published his Works, they were to be considered by the Law as *given to the Public*; and that his private Property in them no longer existed?

The present Claim is founded upon the *Original Right* to this Work, as being the *mental Labour* of the Author: and that the *Effect and Produce* of the Labour is *his*. It is a *personal, incorporeal Property, saleable and profitable*: it has *Indicia Certa*: For though the Sentiments and Doctrine may be called *ideal*, yet when the same are communicated to the Sight and Understanding of every Man, by the Medium of *Printing*, the Work becomes a *DISTINGUISHABLE Subject of Property*, and not totally destitute of *Corporeal Qualities*.

Now, *without Publication*, 'tis useless to the Owner; because without *Profit*: And *PROPERTY*, *without the Power of Use and Disposal*, is an empty Sound †. In that State, † V. ante 'tis lost to the Society, in Point of Improvement; as well Pa. 2338. as to the Author, in Point of Interest.

PUBLICATION therefore is the necessary Act, and only Means to render this *confessed Property useful to Mankind, and profitable to the Owner*: In this, they are jointly concerned.

Now, to construe this only and necessary Act to make the Work useful and profitable, to be “*destructive, at once, of the Author's confessed original Property against his express Will*, seems to be quite harsh and unreasonable: Nor is it at all warranted by the Arguments derived from those *Authors** who advance “*That, by the Law of Nature, Property ends, when corporeal Possession ceases.*” * Bynker-shock, &c.

For *Barbeyrac*, in his Notes on *Pufendorf* †, clearly shews † Lib. 4. c. 6. Not. 1. that the Right acquired from taking Possession does not cease when there is no Possession; That *perpetual Possession* is impossible; That the above Hypothesis would reduce Property to *Nothing*; That the *Consent of the Proprietor* to that Renunciation ought to appear: For, as *Possession* is nothing else but an *indisputable Mark of the Will* to retain what a Man has seized;

seized ; so, to authorize us to look upon a Thing as abandoned by him to whom it belonged, because he is not in Possession, we ought to have some other Reasons to believe he has renounced his personal Right to it.

Wherefore, says he, though we may presume this, in respect to those Things which remain such as Nature has produced them ; yet, as for other Things which are the *Fruits of human Industry*, and which are done with great *Labour and Contrivance* usually—It cannot be doubted but every One would preserve his Right to them, till he makes an open Renunciation.

Now there is no open Renunciation of the Property in the present Case ; but a constructive One only, barely from Publication. “RENUNCIATION, or not,” is a Fact. It is not found ; and ought not to be presumed. But the Contrary is found : ‘Tis found here “That it is against his express ‘Will.’”

But it was said at the Bar, “if a Man buys a Book, it is ‘his own.’”

What ! is there no Difference betwixt selling the PROPERTY in the Work, and only ONE of the Copies ? To say “Selling the Book conveys all the Right,” begs the Question. For, if the Law protects the Book, the Sale does not convey away the Right, from the Nature of the Thing, any more than the Sale conveys it where the Statute protects the Book.

The Proprietor’s Consent is not to be carried beyond his manifest Intent. Would not such a Construction extend the partial Disposition of the true Owner beyond his plain Intent and Meaning ? Which, from the Principles I have before laid down, is no more to be done in this Compact than in the Case of Borrowing or Hiring *.

* V. ante.

Pa. 2338.

Can it be conceived, that in purchasing a Literary Composition at a Shop, the Purchaser ever thought he bought the Right to be the Printer and Seller of that specific Work ? The Improvement, Knowledge, or Amusement, which he can derive from the Performance, is all his Own : But the Right to the Work, the Copy-Right remains in him whose Industry composed it.

The Buyer might as truly claim the Merit of the Composition, by his Purchase, (in my Opinion,) as the Right of multiplying the Copies and reaping the Profits.

The Invasion of this Sort of Property is as much against every Man’s Sense of it, as it is against natural Reason and moral Rectitude. It is against the Conviction of every Man’s own

own Breast, who attempts it. He knows it, not to be his own : he knows, he injures another : And he does not do it for the Sake of the Public, but *malā Fide et Animo Lucrandi*,

The artificial Reasoning, drawn from refined metaphysical Speculation, is all on that Side of the Question. It is arguing by *Analogy*, only, to Things of a different Nature—“ That it is not tangible : And the like.

The Law of Nature and Truth, and the Light of Reason, and the common Sense of Mankind, is on the other Side. For, *Jus Naturæ proprie est dictamen rectæ Rationis, quo scimus quid turpe, quod honestum, quid faciendum, quid fugiendum sit.*

If the above Principles and Reasoning are just, why should the Common Law be deemed so narrow and illiberal, as not to recognize and receive under its Protection a Property so circumstanced as the present ?

THE COMMON LAW, now so called, is founded on the Law of Nature and Reason. Its Grounds, Maxims and Principles are derived from many different Fountains, (says Judge Dodderidge *, in his *English Lawyer*;) from natural and moral Philosophy, from the Civil and Canon Law, from Logic, from the Use, Custom and Conversation among Men, collected out of the general Disposition, Nature and Condition of Human Kind.

He states the several Maxims and Grounds, under the particular Heads, from whence they are derived : And he places under the Head of Moral Philosophy a Maxim of the Common Law, as borrowed from thence—*Quod tibi fieri non vis, alteri ne feceris.*

“ That what is now called the Common Law of England was made up of a Variety of different Laws, enacted by the several Saxon Kings reigning over distinct Parts of the Kingdom ; which several Laws, affecting then only Parts of the English Nation, were reduced into one Body and extended equally to the whole Nation by King Alfred;” appears from Fortescue’s Preface §; and that it is therefore properly called the Common Law of England, because it was done “ Ut in Jus commune totius Gentis transiret.” § P. 6, 8,

But it had an *ancienter Original* than Edward the Confessor ; and was at first called the *Falright* or People’s Right ; (for it is plain it could not be called the Common Law in Edward the Confessor’s Time, for then they spoke Saxon ; nor in William the Conqueror’s Time, for then they spoke French:) But it received this Name, when the Language came to be altered.

altered. And Lord Coke (1 Inst. 142.) says, "the Common Law is sometimes called *Right, Common Right, Common Justice.*" Which Observations I make upon its general Name, to free it from any Imputation of there being any Thing restrictive of its Efficacy in the Name itself; or that it is not equally comprehensive of, and co-extensive with these Principles and Grounds from which it is derived.

The COMMON Law, so founded and named, is universally
† Bracton, *comprehensive—Jubens honesta; Prohibens contraria* †; Its Lib. c. 5. Precepts are in respect to Mankind—"Honeste vivere; Al- Justinian, "terum non laedere; Suum cuique tribuere"."
Inst. I. 1, 3.

In respect to the several Species of Property; though the Rules touching them must ever have been the same, yet the Objects of it were not all at once known to the Common Law, or to the World: And many have been disputed, as not being Objects of Property at Common Law, which yet are now established to be such; as, Gunpowder, &c. &c. &c.

In the Year-Book of 12 H. 8 f. 3. a. b. Great Dispute was made, (*upon the Footing of Property too*) "Whether an Action would lie for taking away a Blood-Hound," The Arguments used against it were such as have, amongst others, been used upon the present Occasion; viz. That it was of no Value nor Profit; but for Pleasure. That Felony could not be committed of it; consequently, not Trespass. That when the Dog was out of the Party's Possession, he ceased to have any Property in him. That a Dog was not titheable; would not pass by a Grant of *omnia bona*. That Replevin or Detinue would lie of a Dog.

N. B. See some of these Arguments, (which I have put all together, for convenience) in the subsequent Cases in *Cro. Eliz.* and *Owen.*

But upon what Principles did the Court determine "that the Action lay?" Upon these—"That where any Wrong or Damage is done to a Man, the Law gives him a Remedy. That if it was only a Thing for Pleasure, yet it was sufficient; as a Poppinjay §, which sings and refreshes my Spirits. That it was not lawful, to take him against my Will—*Hoc facias Alteri, quod Tibi vis fieri*—And that though it be not Felony, yet Trespass well lies:—For, if a Man cut my Trees and take them; 'tis Trespass, though not Felony."

§ Properly preserved even in a Thing so trifling.

Brooke, in his Abr. of this Case, (Tit. "Property," pl. 44.) says, "The Reason why this Property was not liable to the other Remedies, or Charges, or Modes of Conveyance "there

" there mentioned, is because it was a property not properly known : And yet *Trespass* would lie."

From this Case it is clear to me, that though the above was such a Species of Property then not properly known to, or at least not established by Precedent at the Common Law ; yet that the Novelty of the Question did not bar it of the Common-Law Remedy and Protection. That it was sufficient, that it was a DISTINGUISHABLE Property ; that it had a DETERMINATE OWNER. That its being a Matter of Pleasure or Profit, to the Owner, made no Difference. That it was not necessary, that every Species of Property should be liable to all the same Circumstances, Incidents or Remedies. That the Person invading it, had Nothing to do with it. And that he erred against the Rules of Morality and Justice, in disturbing Another's Possession or Pleasure.

One would have thought, after this Case, that Question would have rested. But in 31 Eliz. Owen 93. Cro. Eliz. 125. *Ireland v. Higgins*, It came on again, in an Action for a Greyhound ; wherein, upon a Demurrer to the Declaration, it was argued for the Defendant, " That there was no Consideration to maintain the Assumpſit : For that the Plaintiff was out of Possession of the Dog ; and being feræ Naturæ, he had lost his Interest in it, and had no Remedy for it." But the Action was held maintainable ; though the like Arguments were used as in the Year-Book.

The COMMON LAW being founded on such Principles as have been laid down, and which are avowed by the above Authorities ; the Remedy by Action upon the Case is suited to every Wrong and Grievance that the Subject may suffer from a special Invasion of his Right : For this Sort of Action varies, says Lord Coke †, according to the Variety of the Case. † SCo. 48.2,

That the Invasion of the Plaintiff's Property in the present Case is the proper Subject of such an Action ; That it may be maintained at Common Law, without contradicting any Maxim of its own, any Statute of the Realm, or any Principle of natural Justice ; and That it may well undergo a Constitutional Mode of Trial by Jury, so as to answer every End of Certainty and Justice ; seems to me without any solid Objection : For, I confess, I do not know, nor can I comprehend any Property more emphatically a Man's Own, nay, more incapable of being mistaken, than his literary Works. And if an Author has really and openly abandoned them, that might be found ; or the Plaintiff on such Proof, would fail in his Action. And there may be many Circumstances properly inquirable in an Action of this Sort ; viz. " if the Composition be given to the Public, made common, abandoned ;" " if published without a Name ;" " if not claimed ;" " if allow-

"ed to be pirated, without Objection"—All this is Evidence to the Jury of the *Gift to the Public*; and not at all above the Comprehension of a common Juryman: not so ideal, but that full and satisfactory Evidence may be given of the substantial Work or Composition, and of its original or derivative Ownership. So, an Author being *unknown, or long since dead; no Assignment of the Property; none, or unknown Representatives*; the Edition *long deserted, &c.*; are all Circumstances that may be brought into Proof.

But all the Difficulty lies on the Plaintiff: He is to *make out his Right, and the injury done to his Property.*

In the present Case, there is *no Chasm or Interval of Time* when the Right to this Work can be said to be *renounced*, from the original Publication to the present Time; *unless the bare Act of Publication itself is to be called so.* And if *that alone* was to prevail against a *private Author*, why should not *prerogative Property*, founded on the *same Ground of Arguments* as the *general Property* of Authors in their Works, be *liable to the same free and universal Communion?* For I know no Difference, in *that Respect*, between the Rights of the *Crown* and the *Property of the Subject.*

"That there is any Hardship put upon the Defendant in this Case, for that he may err innocently," I see no just Grounds for saying; because the Defendant *knows* the Work is *not his*, and that he had *no original Right* to publish it. At his *Peril*, therefore, he undertakes to give the Edition; he does it with his *Eyes open*: And "*whether it was Property renounced, or not,*" it was *his Business to inquire.*

Upon the Whole, I think an *Author's Property in his Works, and the Copy-Right, is fully and Sufficiently ESTABLISHED;* because it is admitted to be *Property in his own Hands, and that he has the ORIGINAL Right of first publishing them.*

Further, That this Idea of an Author's Property has been so long entertained, that the *COPY* of a Book seems to have been not familiarly only, but *legally used* as a *technical Expression* of the *Author's SOLE Right of printing and publishing that Work*: And that *these Expressions*, in a Variety of Instruments, are *not to be considered* as the *Creators or Origin of that Right or Property*; but, as speaking the Language of a *known and acknowledged Right*; and, as far as they are *active, operating in its Protection.*

This appears from the Citations used at the Bar, from History, Acts of State, Proclamations, and Decrees in the Star-Chamber,

Chamber, particularly in 1586 and 1637, and down to the Year 1640: Also from the Clauses in Ordinances and Statutes antecedent to the Statute of Queen Ann; and from the Expressions used in that Statute too, which speaks with Precision of this Sort of Property as a *known Thing*; and which, with as much Accuracy, supposes the *Licence and Consent* of the Author or Proprietor *necessary* to the printing of their Works.

This Opinion too is strongly supported by the concurrent Sense of Judges, to be collected from the Expressions they have made Use of in Cases at Common Law, at different Periods of Time. As in *Skinner*, "that the Statute of Car. 2. did not give the Right, but the Action." In 1 Mod. 257—where *Pemberton* speaks of a Grant to print, "How far it should stand good against those who claimed a Property paramount the King's Grant:" And there too, the Making Title to a Copy is mentioned.

The Court too, in speaking of Additions to the Almanac by Prognostication, says, "They alter the Case no more than if a Man should claim a Property in another Man's Copy, by Reason of some inconsiderable Additions of his Own."

In *Pender v. Brady* also, in an Action for printing the Pilgrim's Progress, the Plaintiff is averred to be "the TRUE Proprietor."

In *The Stationers Company v. Partridge*, It seems that the CROWN's sole or original Right to publish was FOUNDED in Property. In 3 Mod. 75—that the Property vests in the King, where no individual Person can claim a Property in the Thing. This Argument shews that *Pemberton* thought he could rest the Case and the Right of the Crown upon Property only: For, here, to get at such Ground, the Argument is far fetched and misapplied; because in a Case of this Kind, if there is no private Property, it would not belong to the King; but be Common, like Animals *feræ Naturæ*, or Air, Water, or the like.

And the Case of *Baskett and The University of Cambridge* is a solemn well considered Determination upon the Ground of the original Right of Publication belonging to the King.

So that though there is no precise Decision in the Point, yet this long uniform Idea of such an Object of Property at Law deserves the greatest Attention and Weight; where every Principle of Reason and Justice concurs with deciding in Favour of the Property.

It was compared with throwing Land into a Highway. The Intent there precedes the Right: As it is given, so it may be used.

used. But the *Intent circumscribes* the Right. Feed it with *Cattle*: and an Action lies: Then, you *exceed* the Purpose of the Gift, and become a *Wrong-Doer*.

But, besides this, the uniform Conduct of the Court of CHANCERY! since the Statute, in entertaining Bills of Injunction without any *Regard* to an *Entry* being made of the Work, pursuant to the Statute, or to the Suit's being brought within the *Limitation* of the Three Months, or within the *Term* given for its Protection, shews, that *that* Court must necessarily have proceeded under the like Idea of a Right *antecedent to*, and *not newly created* by the Statute; For, the Act could not mean to give a Right of Property, and an Action at Law or a Bill in Equity incident thereto, where the *Condition* of Entry is *not* complied with. The Declaration, " That the Author shall have the sole Right of printing the Book," must be on the *Terms and Conditions* in the Act. The Consequences of an Action and Injunction are *worse* than the *Penalties*: And One Reason given by the Act, for requiring the *Entry*, is, " That Persons may not offend through Ignorance." That Circumstance of *Notoriety* was required by all the Licensing Acts and Ordinances.

Second Question. As to the Second Question—" Whether the *Copy-Right* is given away by the Author's Publication—"

I have already spoken upon this Head collectively with the first; and shall only add, That I am of Opinion, that the Publication of a Composition does *not* give away the Property in the Work; but the Right of the Copy *still remains* in the Author; and that no more passes to the Public, from the free Will and Consent of the Author, than an unlimited Use of every Advantage that the Purchaser can reap from the *Doctrine* and *Sentiments* which the Work contains. He may improve upon it, imitate it, translate it; oppose its Sentiments: But he buys no Right to publish the identical Work.

That the *Comparison* made betwixt a *literary* Work and a *mechanical* Production; and that the Right to publish the *One*, is as free and fair, as to *imitate* the *Other*; carries no Conviction of the Truth of that Position, to my Judgment. They appear to me *very different in their Nature*. And the Difference consists in this, That the Property of the Maker of a *mechanical* Engine is confined to that *individual Thing* which he has made: That the Machine made in Imitation or Resemblance of it, is a *different Work in Substance, Materials, Labour and Expence*, in which the Maker of the original Machine can not claim any Property; for it is *not his*, but *only a Resemblance* of his: Whereas the *reprinted Book* is the *very same Substance*; because its *Doctrine and Sentiments*

ments are its *essential* and *substantial* Part ; and the *Printing* of it is a mere mechanical *Act*, and the Method only of publishing and promulgating the Contents of the Book.

The Composition therefore is the Substance : The Paper, Ink, Type, only the Incidents or Vehicle.

The VALUE proves it. And though the Defendant may say " Those Materials are mine," yet that can not give him a Right to the Substance, and to the multiplying of the Copies of it; which, (on whose Paper or Parchment soever it is impressed,) must ever be invariably the same. Nay, his Mixing, if I may so call it, his such like Materials with the Author's Property, does not (as in common Cases) render the Author's Property less distinguishable than it was before : For, the identical Work or Composition will still appear, beyond a Possibility of Mistake.

The imitated Machine, therefore, is a new and a different Work : The Literary Composition, printed on another Man's Paper, is still the same.

THIS is so evident to my own Comprehension, that the utmost Labour I can use in Expressions, can not strengthen it in my own Idea.

Supposing then that the Author has such Property, and that he has not given away or abandoned it by Publication.—

The next Question is,—“ Whether the Statute of Queen Ann has taken it away ; or so restrained it, that an Author's Right to the Copy expires with the Term limited & Ann. by that Statute for its Protection.”

Whoever contends “ that this Kind of Property is not known to the Common Law,” must also contend “ that this Statute creates a new Kind of Property, which it vests for a Time only, in the Authors and their Assigns, under the Conditions and Limitations specified in the Act.”

It must be contended too, to support the Arguments that have been used “ that the Legislature had in View and intended to abolish or suspend for a Time (if the Terms required by the Act were complied with) that Right of universal Communion, which the Publication of any Work gave indiscriminately to all Mankind ; or (in case the Terms of the Act were not complied with) that such Right might be still freely exercised, without Offence.”

THE IDEA of such a common Right does not appear to have existed at the Time of the Statute, or to be warranted by any Authority.

The Preamble of the Act reproves the LIBERTY of late frequently taken, of printing Books and Writings without the Consent of the Author or Proprietor ; and treats it as an ABUSE of a Right, not as an Act done in Assertion of any Common-Law Right which the Statute intended to put only a temporary Restraint to : For, the Act declares it to be done “ To the Detriment of the Proprietors, and to the Ruin of their Families.”

THIS is a very different Language from the Arguments now used, “ That there is no Injury, no Privation of Right, “ for Want of Property in the Thing itself.” And yet the Property now, and then, was exactly the same.

The particular Wording of the Enacting Clause is very material ; as it precisely adopts the identical Expressions anciently used in the Decrees, Ordinances and Statutes referred to : alike speaking of the Right of Authors, as a known, subsisting, transferable Property.

I am not satisfied with saying “ that such Right may be implied from the Words”—They are so express, that the Legislature can not be otherwise understood, than as speaking of a known Property. “ The Copy of the Book,” “ the Title to the Copy,” is a technical Recognition of the Right, in the Words of the Act.

This Act was brought in at the Solicitation of Authors, Booksellers, and Printers, but principally of the two Latter ; not from any Doubt or Distrust of a just and legal Property in the Works or Copy-Right, (as appears by the Petition itself, Pa. 240. Vol. 16. of the Journals of the House of Commons;) but upon the Common-Law Remedy being inadequate, and the Proof difficult, to ascertain the Damage really suffered by the injurious Multiplication of the Copies of those Books which they had bought and published. And this appears from the Case they presented to the Members at the Time.

All the Sanction they could obtain, was a Protection of their Right, by inflicting Penalties on the Wrong-Doer.

The Statute extends to no Case where the Title to the Copy is not entered in the Register of the Stationers Company : Which Entry is necessary to ascertain the Commencement of the

the Term, during which this Protection by *Penalties* is granted. If that requisite is neglected, the Benefit of the Statute does not attach.

The General Case, of Authors who do not comply with this, is still open; and of those too that do, who do not sue within Three months.

For, if a Statute gives a Remedy in the *Affirmative*, (without a Negative, expressed or implied,) for a Matter which was actionable before by *Common Law*; the Party may sue at *Common Law*, and waive his Remedy by Statute, if he pleases. 2 Inst. 200. 2 Roll. 49.

A *Negative can not be implied* here. The Question wholly depends upon the Point. "Whether it be a Right "newly created, or not?" If it was, then it would receive its Birth, Duration and Remedy from the Statute; and no other Remedy could be pursued.

But if there was an *antecedent Common Law Right*, the *Common Law Remedy* will remain; and the *Statute-Remedy* can only be made Use of, by observing the particular *Conditions* which the Act prescribes.

The *Preamble* of the Statute, as it was originally brought in and went to the Committee, was the *fullest Assertion* of the legal Property and undoubted Right of Authors at *Common Law*, that could be: And there was no *saving Clause* at all, in the Act.

When that florid Introduction was *abridged*, 'tis most probable, as the Fact appears, that a *Saving Clause*, was guardedly inserted.

The *Universities* had considerable *Copy Rights*. Lord Clarendon's *History* was but lately published by the University of Oxford: I believe the 3d Volume did not come out till 1707. They came out at different Times.

The *Proviso*, however, is general—"That Nothing in this "Act contained, shall extend either to prejudice or confirm "any Right that the said Universities or any of them, or "any Person or Persons have, or claim to have, to the print- "ing or reprinting any Book or Copy already printed, or "hereafter to be printed."

If there was not a *Common-Law Right previous* to this Statute, what is this Clause to save? Not a Right of publishing, to throw it into *universal Communion* as soon as it comes out. That was no more worth while, than the Purchasing

chasing a Copy seems to me to be, if it is left unprotected by the Law, and open to every Piratical Practice.

It has been said, "that this was inserted, That the Rights which the Universities or Others had, under Letters Patent, might not be affected."

There can be no Ground for this: For, the Act does not at all meddle with Letters Patent, or enact a Title that could either prejudice or confirm them.

THIS PROVISO seems to be the Effect of extraordinary Caution, That the Rights of Authors, at Common Law, might not be affected: For, if it had not been inserted, I apprehend clearly they could not have been taken away by Construction; but the Right and the Remedy would still remain, unaffected by the Statute.

The repeated Practice of the Court of CHANCERY, in entertaining a Jurisdiction by Bills of Injunction, and for Relief, (as appears by many Cases cited,) evidences the constant Sense of the great Lawyers in that Court to be, "That the Statute did not stand in the Way of a General Remedy upon the Original Right."

To this Purpose, the Cases mentioned in Chancery after the Expiration of the Time given by the Statute of 8 Queen Ann, are extremely material: And the Authority of Lord Hardwicke, Lord Talbot, Sir Joseph Jekyll, or any other great Lawyer, sitting in Chancery, and deciding on a legal Right, for the Sake of a more effectual Relief given there, is as good an Authority, as if they gave an Opinion on that legal Right, sitting in this Court.

They have always been so considered, and always so cited.

In the very last Opinion but One, given in the House of Lords by all the Judges, (upon a Limitation over upon dying without Issue, Kelly v. Fowler, in Dom. Proc. in January 1768,) the Cases cited were almost all of them Determinations in the Court of Chancery.

It is most certain, that an Injunction in Nature of an Injunction to stay Waste, never is continued to the Hearing, where the Court is not strongly of Opinion with the Plaintiff: And if the Case can not be varied at the Hearing, the same Grounds upon which it is continued, must be sufficient for a perpetual Injunction.

And therefore where the Defendant can not vary the Case, he submits, and the Cause drops; unless the Plaintiff thinks fit to go on for some further Relief, besides the Injunction: Or, if

if the Defendant is dissatisfied with the Order continuing the Injunction, he may appeal to the House of Lords. And many Questions are finally determined in that short Way.

Upon the Case of *Eyre v. Walker*, Sir Joseph Jekyll granted an injunction to restrain the Defendant from printing The Whole Duty of Man; though the first Assignment that was produced appeared to have been made in December 1657. It was said at the Bar, "that it must be the New Whole Duty of Man; and that it must be *within* the Time of the Act." I have compared the Title-Pages of those Two Books. They are very different: And the Copy of the Order of the 9th of June 1735 shews it to be the old One. Dr. Hammond's Letter to the Bookseller shews it to be that in 1657.

The Answer given to the Case of *Motte v. Falkner*, 28th of November 1735, before Lord Talbot, for printing Pope's and Swift's Miscellanies, was, "that this Book of Miscellanies was printed in the Year 1727." But it was argued by the Council in Chancery, upon the Foundation that many of the Parts of that Miscellany were printed so long before as to take it entirely out of the Act; as "Contests and Dissensions at Athens and Rome*;" "Prediction for 1708 †;" * 1701. "Partridge's Death, 1708 ‡;" "Sentiments of a Church † 1708. "of England Man §." Lord Talbot continued the Injunction ‡ 1707. as to the Whole. § 1708.

In *Tonson et al. v. Walker alias Stanton*, 5th of May 1739, || Assignment to restrain the Defendants from printing Milton's Paradise Lost, the Injunction was granted by Lord Hardwicke, on Author, 27th April 1767, to Samuel Symonds; and Lord Mansfield's Motion, upon reading the Assignment in 1667 ||; and acquiesced under.

In *Tonson v. Walker and Merchant* 30th of April 1752; several the Bill had been filed on 26th of November 1751, suggesting that the Defendants had advertised to print Milton's Paradise Lost, with his Life by Fenton, and the Notes of all the former Editions, of which Dr. Newton's were the last, in 1749. (These last Notes were *within* the Act.) Upon a very solemn Hearing, Lord Hardwicke granted the Injunction. And it was penned in the Disjunctive,—"To restrain the Defendants from printing the Life of Milton, or Milton's Paradise Lost, or Dr. Newton's Notes."

These Cases prove "that the Court of Chancery granted Injunctions to protect the Right, on Supposition of its being a legal One."

And no Injunction was ever refused in Chancery, upon the Common Law Right, till a Doubt was supposed to have arisen in

in this Court, from the Case of *Tonson v. Collins* (which was then depending) having been twice argued, and then adjourned to be argued before all the Judges: The Reason of which has often been declared to be, *not* from any *Doubts or Difference of Opinion*; but merely from a Supposition of *Collusion*; and which Collusion was afterwards the Cause why it was neither argued nor determined.

UPON THE WHOLE, I conclude, that upon every Principle of *Reason*, *Natural Justice*, *Morality* and *Common Law*; upon the Evidence of the long received Opinion of this Property appearing in ancient Proceedings, and in Law-Cases; upon the clear Sense of the *Legislature*; and the Opinions of the greatest *Lawyers* of their Time, in the Court of *Chancery*, since that Statute; The *RIGHT of an Author to the COPY of his Works* appears to be well founded; And that the *Plaintiff* therefore is, upon this special Verdict, *intitled to his Judgment*. And I hope the Learned and Industrious will be permitted from henceforth, not only to reap the *Fame*, but the *PROFITS* of their ingenious Labours, without Interruption; to the Honour and Advantage of Themselves and their Families.

Mr. Justice *YATES* was of a different Opinion from the Two Judges who had spoken before him.

He said he should ever be extremely diffident of any Judgment of his own, when he had the Misfortune to dissent from Either of his Brethren: And, after the very learned and ingenious Arguments which each of them had now delivered, he could not but feel, with particular Sensibility, the unequal Task he had now before him.

He regretted too, that in so liberal a Question, so important to the Literary World, and a Question of so much Expectation, there should be any Disagreement upon this Bench. But he observed, that if he should happen to stand quite alone in the Opinion he had formed, his Sentiments would no Way affect the Authority of the Decision.

Whatever his Opinion, however, might be; sitting in his judicial Capacity, he thought himself bound, both in this and in every Cause, to declare it *frankly and firmly*.

After this very decent Preface, he spoke near Three Hours in Support of his Opinion. It cannot therefore be expected that I should give the very *Words* which he spoke: But I shall endeavour to convey the *Substance* of what he said; though not without some Injury to the Composition and Language.

It was to the following Effect—

The General Question for the Determination of the Court, is, “Whether, after a voluntary and general Publication of an Author’s Works by himself, or by his Authority, the Author has a SOLE and PERPETUAL Property in that Work; so as to give him a Right to confine every subsequent Publication to himself and his Assigns for ever.”

Before I enter into the particular Discussion of this Question, I will lay down One general Position: which, I apprehend, can not be on either Side disputed:—“That in all private Compositions, (I mean the Composition of private Authors, as contradistinguished from public Prerogative Copies,) the Right of Publication must for ever depend on the Claimant’s Property in the Thing to be published.” Whilst the Subject of Publication continues his own exclusive Property, he will so long have the sole and perpetual Right to publish it: But whenever that Property ceases, or by any Act or Event becomes common, the Right of Publication will be equally common.

In delivering my Sentiments upon this great Question, I will pursue the same Method in which it was argued at the Bar, both in this, and in a former Case between Tonson and Collins: For, I desire (once for all) to be understood as delivering my Opinion, upon the Argument of the Council, and upon my own Consideration of the Matter; and not by Way of Reply to any Thing that has fallen from either of my Brothers.

By the Counsel, it was argued on these Two Points—1st, On the general Principles of Property: and 2dly, On the peculiar, or at least the supposed Usage and Law of this Kingdom.

First then, It was contended, “That the Claim of Authors to a perpetual Copy-Right in their Works, is maintainable upon the general Principles of Property” And this, I apprehend, was a necessary Ground for the Plaintiff to maintain: For, however peculiar the Laws of this and every other Country may be, with Respect to Territorial Property, I will take upon me to say, that the Law of England, with respect to all personal Property, had its grand Foundation in Natural Law.

In support therefore of this first Proposition, several plausible Arguments were ingeniously urged by the Plaintiff’s Counsel. In the first Place, they observed, Property was defined to be “*Jus utendi et fruendi*;” and that an Author has certainly that Right over his own Productions. But

But this is a Definition that merely relates to the *personal Dominion of a Proprietor*, and not to the Object: It respects an acknowledged Subject of Property; not the Object which is presumed to be so; (which is now the *Question in Dispute*.) Nay, it even supposes an acknowledged Proprietor; and merely describes the Extent of his Dominion. He who has the Property is the Proprietor. But the Dominion of a Proprietor can not extend beyond the Duration of the Property: No Man can have that Right beyond the just Bounds of his Property. And the Point contended by the Defendant is, "that a literary Publication becomes no longer an Object of Property;" "that a literary Publication becomes no longer an exclusive private Right."

In Answer to this, it was contended on the other Side, "that an Object of Property is VALUE; and literary Compositions have their Value, which is measured by the Extent of their Sale."

I might here observe, that it will be difficult to annex a specific Value to incorporeal Sentiments, when they are detached from the Manuscripts, and published at large. From that Time, the Value, with Respect to the Author, depends upon his Right to the sole and perpetual Publication of them; And the great Point in Question is, "whether he is intitled to that Right, or not." But laying this Observation aside, Mere Value (all may see,) will not describe the Property in this. The Air, the Light, the Sun, are of Value inestimable: But Who can claim a Property in them? Mere Value does not constitute Property. Property must be somewhat exclusive of the Claim of Another.

It was therefore alledged, "that a literary Composition is certainly in the sole Dominion of the Author, till he thinks proper to publish it:" For, no Man can lawfully take it from him, or compel him to publish against his Will.

This is most certainly true. But this holds good no longer than while it is in Manuscript.

Here, the Defendant has not meddled with the Author's Manuscript. The Work was published Forty Years ago. The Defendant has printed a Set of his Own. He has not meddled with any Property of the Author's; unless the very Style and Sentiments in the Work were his.

It was necessary therefore for the Plaintiff's Counsel, to advance the Proposition (and which was the only one that affected the Cause) namely, "That the Author has a perpetual

"tual

"*real Property in the Style and Ideas of his Work; and therefore that he or his Assigns will be for ever intitled to the sole and exclusive Right of it.*"

It was argued, That Invention and Labour are the Means of acquiring Property; and that literary Compositions are the Objects of the Author's sole Pains and Labour: Therefore they have the sole Right in them.

If this Argument is confined to the *Manuscript*, it is true: It is the Object only of his own Labour, and is capable of a sole Right of Possession. But it is not true, if extended to his IDEAS.

All Property has its proper Limit, Extent, and Bounds. *Invention or Labour* (be they ever so great) can not change the *Nature of Things*; or establish a Right, where no private Right can possibly exist.

The Inventor of the Air-Pump had certainly a Property in the *Machine* which he formed: But did he thereby gain a Property in the *Air*, which is common to All? Or did he gain the sole Property in the *abstract Principles* upon which he constructed his Machine? And yet these may be called the Inventor's Ideas, and as much his sole Property as the Ideas of an Author.

To extend this Argument, beyond the *Manuscript*, to the very IDEAS themselves, seems to me very difficult, or rather quite wild. Indeed the Invention and Labour, which are ranked among the Modes of acquiring specific Property in the Subject itself are that Kind of *Invention and Labour*, which are known by the Name of *Occupancy*. In that Sense, *Invention* is defining or discouyering of a vacant Property: And *Labour* is the taking *Possession* of that Property, and bestowing *Cultivation* upon it. Property is founded upon *Occupancy*.

But how is *Possession* to be taken, or any Act of *Occupancy* to be asserted, on mere intellectual Ideas? All Writers agree, that no Act of Occupancy can be asserted on a bare Idea of the Mind. Some Act of Appropriation must be exerted, to take the Thing out of a State of being common, to denote the Accession of a Proprietor: For, otherwise, how should other Persons be apprized They are not to use it? These are Acts that must be exercised upon *Something*. The Occupancy of a *Thought* would be a new Kind of Occupancy indeed. But what outward Mark must the Property denote Appropriation? And if these are void of that which the Act of Occupancy requires, it is a Proof to me they cannot be the Object of Property.

Here

Here another Doubt arises, which I can not, I acknowledge, answer—“At what Time, and by what Act, does the Author’s Common Law Property attach?”

The Statute of Queen Ann very properly obviated this, by fixing the Commencement of his Property from the Time of Publication; first, entering it at Stationers Hall. And in the Case of a mechanical Invention, it commences from the Date of the Patent.

But if Authors derive their Right from Common Law, (a Law which has existed from Time immemorial, and therefore long before the Stationers Company existed, and can have no Dependance on the Stationers Company,) the Author’s Right will be the same, whether he enters it in that Book, or not.

When therefore does this Idea of the Author’s Property attach? In other Cases, as where the Heir has a Right to any Species of Property, it commences from his taking Possession. An Author is fully possessed of his Ideas, when they arise in his Mind: And therefore from the Time these Ideas occur to him; or from the Time he writes them down, they are his Property. Then if another Man has the same Ideas as an Author, he must not presume to publish them: He may be told these Ideas were pre-occupied, and thereby became private Property.

It would be strange indeed, if the very Act of Publication can be deemed the Commencement of private Property. Even after Publication, many Thousands may never set their Eyes upon the Book: Yet would not these have a Right to choose the same Subject? and may they not have the same Ideas upon it?

The Improbability of their hitting upon those Ideas is not to the Point. If they should occur to the Author; he has a Right to publish them. Of this, I think, there can hardly be a Doubt. Yet Property, says Puffendorf, is a Right by which the very Substance of a Thing belongs to one Person, so that it can not, in the Whole, nor after the same Manner, become Another’s. And the Digests speak to the like Effect. Sentiments are free and open to all: And many People may have the same Ideas upon the same Subject. In that Case, every one of these Persons to whom they independently occur, is equally possessed and equally Master of all these Ideas; and has an equal Right to them as his own. Is it possible then that any one Individual can have a sole and exclusive Property in these?

But

But there is one Ground more upon which the Plaintiff's Counsel contended this Claim of Right; and which, at first Sight, appears the most specious of all. They endeavoured to enforce this Copy Right of Authors, as a *moral* and *equitable* Right; and to support it by Arguments calculated to prove that it is so.

For this Purpose, Mr. *Blackstone* observed that the Labours of the *Mind* and Productions of the *Brain* are as justly intitled to the Benefit and Emoluments that may arise from them, as the Labours of the *Body* are; And that literary Compositions, being the Produce of the *Author's own Labour and Abilities*, he has a *moral* and *equitable* Right to the Profits they produce; and is fairly intitled to these Profits *for ever*; and if Others usurp or encroach upon these moral Rights, they are evidently guilty of Injustice, in pirating the Profits of Another's Labour, and reaping where they have not sown.

This Argument has indeed a captivating Sound: it strikes the Passions with a winning Address: But it will be found as fallacious as the rest, and equally begs the very Question in Dispute. For, the *Injustice* it suggests, depends upon the *Extent and Duration of the Author's Property*; as it is the *Violation* of that Property that must alone *constitute* the Injury. If therefore his Property be *determined*, no Injury is done him. The Question, therefore, is "whether ALL the Property of the Author did not cease, and the Work become open, by his own Act of PUBLICATION." In that Case, the Defendant can not be charged with any *Injustice*; but has merely exercised a *legal* Right. And however we may lean to literary Merit, the Property of *Authors* must be subject to the same Rule of *Law*, as the Property of other Men is governed by. It is, therefore, as capable of being laid open, as any other Invention of any other Man's: And if, by Publication, it becomes common, (as I shall observe by and by,) Can the Author complain of the Loss? Can he complain of losing the Bird he has himself voluntarily turned out?

But it is insisted, "that it conscientiously belongs to the Author himself, and his Assigns for ever; as being the Fruits of his own Labour."

"That every Man is intitled to the *Fruits of his own Labour*," I readily admit. But he can only be intitled to this, according to the fixed Constitution of Things; and subject to the general Rights of Mankind, and the general Rules of Property. He must not expect that these Fruits shall be eternal; that he is to monopolize them to Infinity; that every

Vegetation and Increase shall be confined to *himself alone*, and never revert to the *Common Mass*. In that Case, the Injustice would lie on the Side of the *Monopolist*, who would thus exclude all the Rest of Mankind from enjoying their *natural and social Rights*.

The Labours of an Author have certainly a Right to a Reward: But it does not from thence follow that his Reward is to be *infinite*, and *never to have an End*. Here, it is ascertained. The Legislature have fixed the Extent of his Property: They have allowed him Twenty-eight Years; and have expressly declared, he shall have it *no longer*. Have the Legislature been guilty of Injustice? Little Cause has an Author to complain of Injustice, after he has enjoyed a Monopoly for Twenty-eight Years, and the Manuscript still remains his own Property. It has happened in the present Case, that the Author and his Assignee together, have enjoyed the Emolument of this Work between Thirty and Forty Years: And the Plaintiff still has the Manuscript.

If a Stranger had taken his Manuscript from him, or had surreptitiously obtained a Copy of his Work and printed it before him, he might then complain of Injustice. And here lies the Fallacy of this specious Argument: it was put as if the Author was *totally robbed* of the Profit of his Labour; As if *all* his Emolument was foretossed, without suffering him to reap *any* Emolument whatever.

In that Case, it would be the *biggest Injustice*. But when no such Intrusion has been made upon his Property: when he and his Assigns have enjoyed the *whole Produce* of his Labour for *Twenty-eight Years* together and upwards, What Ground can remain for accusing the Defendant of *Immorality*; or for the Author or his Assigns to say "He is *robbed* of the Fruits of his Labour?"

If an Author is permitted to enjoy his Property according to the *Nature* of it, he can have *no Injustice* done him: And if his Situation is such, that he can only dispose of it as other People can of their Goods; or if he can only dispose of it for the *first Publication*; Can the Author murmur because he can dispose of it *only as other People can of their Property*? Shall an Author's Claim continue, *without Bounds of Limitation*; and for ever restrain all the Rest of Mankind from their *natural Rights*, by an *endless Monopoly*? Yet such is the Claim that is now made; a Claim to an *exclusive Right* of publication, *for ever*: For, Nothing less is demanded as a Reward and Fruit of the Author's Labour, than an *absolute Perpetuity*.

EXAMPLES might be mentioned, of *as great* an Exertion of natural Faculties, and of *as meritorious* Labour in the *mechanical*

nical Inventions, as in the Case of Authors We have a recent Instance, in Mr. HARRISON's *Time-piece*; which is said to have cost him Twenty Years Application. And might not he insist upon the *same Arguments, the same Chain of Reasoning, the same Foundation of moral Right, for Property in his Invention, as an Author can for his?*

If the Public should rival him in his Invention, as soon as it comes out, might not he as well exclaim, as an Author, "that they have *robbed him of his Production, and have ini-*" "*quitously reaped where they have not sown?*" And yet we all know, whenever a MACHINE is published, (be it ever so useful and ingenious) the Inventor has no Right to it, but only by PATENT; which can only give him a temporary Privilege.

As therefore, this Charge of *Injustice* depends upon the EXTENT of the Author's Property; (for if no Right is invaded, no Injury is done)—Let us now consider the general Rules concerning PROPERTY; and see whether this Claim will coincide with any One of them.

THE CLAIM is to the STYLE AND IDEAS of the Author's Composition. And it is a well-known and established Maxim, (which I apprehend holds as true now, as it did 2000 Years ago) "That Nothing can be an Object of Property, which has not a CORPOREAL Substance."

There may be many different Rights, and particular distinct Interests, in the same Subject; and the several Persons intitled to these Rights may be said to have an Interest in them: But the Objects of them all, the principal Subject to which they relate, or which they enjoy, must be corporeal. And this, I apprehend, is no arbitrary ill-founded Position; but a Position which arises from the necessary Nature of all Property. For, Property has some certain, distinct and separate Possession: The Object of it, therefore, must be something visible. I am speaking now, of the Obj. to which all Rights are confined. There must be something visible; which has Bounds to define it, and some Marks to distinguish it. And that is the Reason why these great Marks are laid down by all Writers —— It must be something that is visible and distinctly enjoyed; that which is capable of all the Rights and Accidents and Qualities incident to Property: And this requires a Substance to sustain them.

But the Property here claimed is all ideal; a Set of Ideas which have no Bounds or Marks whatever, Nothing that is capable of a visible Possession, Nothing that can sustain any One of the Qualities or Incidents of Property. Their whole

Existence it in the Mind alone ; incapable of any other Modes of Acquisition or Enjoyment, than by mental Possession or Apprehension ; safe and invulnerable, from their own Immateriality : No Trespass can reach them ; no Tort affect them ; no Fraud or Violence diminish or damage them. Yet these are the Phantoms which the Author would grasp and confine to himself. And these are what the Defendant is charged with having robbed the Plaintiff of.

In Answer to these Objections, it was alledged for the Plaintiff, " that there are many other Instances of incorporeal Rights ; such as all the various Kinds of prescriptive Rights and partial Claims."

But the Fallacy lies in the equivocal Use of the Word " Property ;" which sometimes denotes the Right of the Person ; (as when we say, " such a One has this Estate, or " that Piece of Goods ;") sometimes, the Object itself.

Here, The Question is upon the Object itself, not the Person. I readily admit that the Rights of Persons may be incorporeal.

But the Question is now, " Whether any Thing can be the Object of proprietary Right which is not the Object of Corporeal Substance." And, for my own Part, I know not of any one Instance of any one Right which has not Respect to corporeal Substance. Every prescriptive Inheritance, every Title whatever has Respect to the Lands in which they are exercised. No Right can exist, without a Substance to retain it, and to which it is confined : It would, otherwise, be a Right without any Existence.

To get over this, it was said, The Profits of Publication, till they are received, are *uncertain and casual*, and can not in themselves be an Object of Property. They are also *incidental*, arising entirely from the Matter which is published. The Composition therefore is the *principal Object of Property* ; upon which, all the Profits depend, and which alone can intitle the Author to those Profits : For, these, like the Profits of an Estate, depend upon the Property in that Person to whom they arise.

If the Author will pretend to a *perpetual Right* in those, he must prove he has a perpetual Right to the Ideas which produced them.

Then the Question returns again, " Whether, after Publication, the Work continues *solely* the Author's for ever."

* Vide ante p. 2352. Here, the Maxim occurs which I mentioned before *, That Nothing can be an Object of Property, which is not capable of

of a sole and exclusive Enjoyment. For, Property, as Puffendorf observes, implies a Right of excluding Others from it. For, without that Power, the Right will be insignificant: It will be in vain to contend that “*that is your Own,*” which you can not prevent Others from sharing in.

It is not necessary, I own, that the Proprietor should always have the total *actual Possession* in himself. A *potential Possession*; a *Power* of confining it to his own Enjoyment, and excluding all Others from partaking with him; is an Object or Accident of Property.

But how can an Author, after publishing his Work, confine it to himself? If he had kept the Manuscript from Publication, he might have excluded all the World from participating with him, or knowing the Sentiments it contained: But by publishing the Work, the whole was laid open; every Sentiment in it made public, for ever; and the Author can never recall them to himself, never more confine them to himself, and keep them subject to his own Dominion.

The Quotation from the Institutes relating to wild Animals, is very applicable in this Case. They are yours, while they continue in your Possession; but no longer. So, from the Time of Publication, the Ideas become incapable of being any longer a Subject of Property: All Mankind are equally intitled to read them; and every Reader becomes as fully possessed of all the Ideas, as the Author himself ever was.

From these Observations, this Corollary, in my Opinion, (for I speak only my own Sentiments) does naturally follow; “ That the *Act of Publication*, when voluntarily done by “ the Author himself, is, virtually and necessarily a *Gift to* “ the Public.” For, when an Author throws his Work into so public a State that it must immediately and unavoidably become common, it is the same as expressly giving it to the Public. He knows, before he publishes, that this will be the necessary Consequence of the Publication: Therefore he must be deemed to intend it. For, whoever does an Act of any kind whatever *designedly* and *knowingly*, must of Course intend every necessary Consequence of that Act. To this I might add, that in every Language, the Words which express a Publication of a Book, express it as giving it to the Public.

But in the Argument, it was contended, “ that the Author “ gives Nothing to the Public, but the *mere Perusal* of it; “ and still preserves the perpetual Right to the Work;” “ That an Author’s publishing and selling a Book is only like “ giving the Buyers so many *Keys* to a Gate, or *Tickets* to

" an Opera ; that those were only given for the Parties
 " themselves, but would not entitle them to forge other
 " Keys or Tickets."

To this the Answer is, I think, easy and evident. If the Author had not published his Work at all, but *only lent* it to a particular Person, he might have enjoined that particular Person, " that he should *only peruse* it ;" because, in *that* Case, the Author's Copy is his own ; and the Party to whom it is lent contracts to observe the *Conditions of the Loan* : But when the Author makes a *general Publication* of his Work, he throws it *open to all Mankind*.

THAT is then, very different from the Case of giving *Keys or Tickets* to *particular Persons*. The *very Condition* of giving them is the Exclusion of all *other Persons*. And these Keys or Tickets give the Party to whom they are given no Property to the *Land* they pass through, or to the *Opera-House* : They are given them for a *particular Time*, and to give them a *transient Admission*, a temporary Privilege only. It is like an Author's *lending his Manuscript* to particular Friends ; who still retains the Right over it, to *recall* it whenever he pleases.

But when an Author *prints and publishes* his Work, he lays it *entirely open to the public*, as much as when an Owner of a Piece of Land lays it open into the *Hightway*. Neither the Book, nor the Sentiments it contains, can be afterwards recalled by the Author. Every *Purchaser* of a Book is the *Owner* of it : And, as such, he has a Right to make *what Use* of it he pleases.

PROPERTY, according to the Definition given of it by the Defendant's Counsel, is "*Jus utendi et fruendi*." And the Author, by empowering the Bookseller to *sell*, impowers him to *enjoy this general Property* : And the *Purchaser* of the Book makes *Stipulations* about the *Manner* of using it.

The *Publisher* himself, who claims this *Property*, sold these Books, *without making Contract* whatever. What Colour has he, to *retrench* his own Contract, or *impose* such a *Prohibition* ?

Nothing less than *Legislative Power* can *restrain the Use* of any Thing, If the Buyer of a Book may not make *what Use* of it he pleases. What Line can be drawn that will not tend to supersede *all his Dominion* over it ? He may not *lend* it, if he is not to *print* it ; because it will intrench upon the Author's Profits. So that an *Objection* might be made even to his lending the Book to his *Friends* ; for he may prevent

prevent those Friends from *buying* the Book ; and so the Profits of such Sale of it will not accrue to the Author. I don't see that he would have a Right to *copy* the Book he has purchased, if he may not make a *Print* of it : For, printing is only a Method of *transcribing*.

With Regard to Books, the very *Matter and Contents* of the Books are by the Author's Publication of them, *irrevocably given to the Public* ; they become *common* ; all the *Sentiments* contained therein, rendered *universally common* : And when the Sentiments are made *common* by the Author's own *Act*, **EVERY USE** of those Sentiments must be *equally common*.

To talk of *restraining* this Gift, by any *mental Reservation* of the Author, or any *Bargain* he may make with his *Bookseller*, seems to me quite chimerical.

It is by *legal Actions* that other Men must judge and direct their Conduct : And if such Actions plainly import the Work being made *common* ; much more, if it be a *necessary Consequence* of the *Act*, " that the Work is actually thrown open " by it ; No *private Transaction* or secretly-reserved Claim of the Author can ever *control* that necessary Consequence. Individuals have no Power, (whatever they may wish or intend), to alter the fixed Constitution of things : A Man can't retain what he parts with. If the Author will *voluntarily* let the Bird fly, his Property is gone ; and it will be in vain for him to say " He *meant* to retain" what is absolutely flown and gone.

There is another Maxim too, concerning Property; " That " Nothing can be an Object of Property, that is not capable " of *distinguishing* *proprietary Marks*."

The principal *End* for which the first Institution of Property was established, was to preserve the *Peace* of Mankind ; which could not exist in a *promiscuous Scramble*. Therefore a moral Obligation arose upon all, " That none should *intrude* " upon the *Possession* of Another." But this Obligation could only take Place where the Property was *distinguishable* ; and every Body knew that it was not open to another. Mankind must have a Knowledge of what is their Duty, in order to observe it by abstaining from every Violation of it: The Breach of a Duty must be *wilful*, to make it criminal.

It was necessary, therefore, that every Person should have some *Indicia*, some *distinguishing Marks* upon his Property, to denote his being the Proprietary therein : For, hard would be the Law that should adjudge a Man guilty of a *Crime*, when he

he had no Possibility of knowing that he was doing the least Wrong to any Individual.

Now where are the *Indicia* or *distinguishing Marks* of Ideas? What distinguishing Marks can a Man fix upon a Set of intellectual Ideas, so as to call himself the *Proprietor* of them? They have *no Ear-marks* upon them; *no Tokens* of a particular Proprietor.

If the *Author's Name* be inserted in the Title-Page, that is no Reason: For, many of our best and noblest Authors have published their Works from more generous Views than pecuniary Profit. Some have written for *Fame*, and the *Benefit of Mankind*: Others have had such pecuniary Views, only for a *Time*; and have *afterwards* left their Work open to all Mankind.

On the other Hand, If the Author's Name was *omitted* in the Title-Page, he might *equally insist* on the Claim: For, if the *Property* be *absolutely his*, he has no Occasion to add his Name to the Title-Page. How is it to be known, when such a Sort of Property is abandoned? In all Abandonments, two Circumstances are necessary; an *actual* relinquishing the Possession, and an *Intention* to relinquish it. But in what Manner is the Possession of intellectual Ideas to be relinquished? Or how is the Intention of relinquishing them to be manifested? *Mere mental Ideas* admit of no actual or visible Possession; and consequently are capable of no Signs or Tokens of Abandonment.

The *Legislature* had plainly this Objection in View, when they penned the Statute of Queen *Ann*, to give Authors a temporary Property in their Works. For, in the Preamble, * *Sect. 2.* it is said *—“ Whereas many Persons may, through Ignorance, offend against this Act; unless some Provision be made, whereby the Property in every such Book as is intended by this Act to be secured to the Proprietor or Proprietors thereof, may be ascertained; Be it therefore enacted, &c, unless the Title to the Copy of the Book be entered in the Register-Book of the Stationers Company.” And from that Register-Book any Person may see whether the Author intended to make a Property of his Work; and they may see the Duration of such Property: For the Property is to commence from the Publication of the Work, provided it be so regularly entered as the Act requires.

But if Authors have a Right at *Common Law*, they need not enter their Books at all with the Stationers Company; They may *wave that*. And in Case they do *not* enter them, by what Marks, then, must this Property in Ideas be distinguished?

guished ; And how will the Difficulty *encrease*, if the Property extends not only to Fourteen, or Twenty-eight Years, but *for ever* ?

Therefore it appears to me, That this Claim of perpetual Monopoly is by no Means warranted by the general Principles of Property : And from thence I should have thought that it could not be a Part of the *Common Law of England*.

But I will now consider the second general Ground, upon which this perpetual Copy-Right was argued at the Bar ; namely, the *supposed Usage and Law of this Kingdom*.

Under this Head, it was contended, “ That the Right of an Author to the sole Publication and perpetual Monopoly of his Works, though it were not maintainable on general Principles, is yet a Kind of *customary Property*, a Right that has always been allowed and supported in this Kingdom.”

If it was so, it is strange that in all our Laws, where every Kind of Property is so much discussed, a Claim so extensive as this, is not absolutely established. And yet it was admitted by the Plaintiff’s Counsel, “ That they could not produce any one Determination in a Court of Law, that had established any such Kind of Property.” They attempted, however, to set up some extraordinary Substitutes, to supply this Deficiency. The first was the Finding in the Special Verdict, “ that before the Reign of Queen Ann, it was usual to purchase from Authors the perpetual Copy-Rights of their Books, and to assign the same from Hand to Hand, for valuable Considerations ; and to make them the Subject of Family-Settlements.”

A Description thus painted, with the striking Ideas of Purchase and Family-Possessions, may, at first Sight, dazzle the Eye, and catch our Passions : But, when nearer looked at, and fairly viewed and examined, we shall find it merely an Illusion.

There are but two Lights, in which it can be applied to the present Question : Either, 1st, As establishing a *customary Property* in Fact ; or 2dly, As shewing that there was a general Idea or Notion of such a Right, antecedent the Statute of Queen Ann.

With Respect to the former—It is impossible that it can establish any *customary Claim*. It is no Usage of which the Law can take Notice ; being merely an Allegation of particular Contracts which some Individuals have made before the Reign of Queen Ann. Whereas, to constitute a *legal Custom*, it must have these two Qualities : First, A Custom must import some general Right in a District, and not a few mere private

vate Acts of *Individuals*; And, in the next Place, such Custom must appear to have existed *immemorially*. All Customs operate (if they have any operation) as *positive Laws*. The mere *Fact of Usage* will be no Right at all, in *itself*: But when a *Custom* has prevailed from Time *immortal*, it has the Evidence and Force of an *immortal Law*.

If the Custom be *general*, It is the *Law of the Realm*: If *Local only*, It is *Lex Loci*, the *Law of the Place*.

Now, all Laws are *general*, as far as the Law extends; and all *Customs of England* are of Course *immortal*. No *Usage*, therefore, can be *Part* of that Law, or have the Force of a *Custom*, that is not *immortal*.

Here, no such general or *immortal Usage* is suggested; This finding is merely an *Allegation* of *particular Contracts* made with *particular Individuals* before the *Reign of Queen Ann*.

So far, it is true, appears upon this finding "That prior
" to that Reign, Copies have been purchased for valuable
" Considerations, and made the Subject of *Family Settlements*."—But, how long before? Whether One Hundred Years, Fifty Years, or Ten Years, is not stated. Very certainly, it could not be *immortal*: For, the *Art of Printing* was not known in this Kingdom,* till the Reign of Ed. 4. Therefore the Contracts could not be derived from the *ancient immemorial Law of the Land*, And, consequently, they could not create a Species of Property which was *unknown* to that Law.

* See the Note subjoined to the End of this Case.

It is indeed impracticable, to draw any Inference from such a Proposition as this is. For the Verdict does not find "that these Rights were ever enforced against STRANGERS." The Parties would undoubtedly *acquiesce in the agreement*: And the Families on whom they were settled would not *reject* a Settlement, however chimerical. But, unless it was shewn that these Claims have been enforced against Strangers, no *private Contracts* or *Family-Settlements*, can impose a *Law* upon the *Public*.

It is said, "They serve to shew there was a *general Idea* and *Apprehension* of the Existence of such a Right, before the Statute of Queen Ann" Admit the Idea had been *ever so general*; What are we thence to infer? If the Ideas and Sentiments and Apprehensions of Individuals were sufficient Ground whereupon to establish a Species of *Property*; What a vast Extent would this carry it to!

Immense Ideas of *Property* were raised in the South-Sea Stock, in the Year 1720. In that Year, innumerable Rights of

of this Kind were bought and sold ; and these Transactions passed between Parties whose Ideas were as sanguine as any Authors could be “ that the Ideas they sold were real Property :” And yet the Subjects that were sold were, in Truth and Fact, *no real Property*.

The Good-Will of a Shop, or of an Ale-House, and the Custom of the Road (as it is called among Carriers,) are constantly bargained for and sold, *as if* they were Property. But what are these ? Nothing more than the Good-Will of the Customers, who may withdraw from them, the very next Day, if they please. The Purchaser of this Custom or Good-Will gains no certain Property in it ; he has no Power to *confine* it to himself, nor can he use any Power to *prevent other People* from gaining the Custom. It is an Advantage, indeed, so far of Service, as it gives the Purchaser a *Priority* for Custom. And so it is in the Case of the Publication of a Book : It gives a *Priority*, and gets a Set of *first Customers*. But none of these Cases can establish an *absolute, perpetual, exclusive Property*.

Whatever Ideas Individuals may form, or however they may traffick among themselves in imaginary Claims, they can not affect the real Right of the Public, who are no Parties to such Contracts : They can't create Law.

It is a well-known Maxim in our Law, “ that no Man can by any Device whatever, *create a new Consequence* out of an Estate, or *innovate* upon the Law of the Land.” He can not annex to his Estate any *novel Conditions* that are *inconsistent* with the Nature of the Estate : Much less, can the *Acts or Interests of Individuals* abridge the *Public* of their *natural Right*, or *establish Monopolies*.

The next Arguments urged in Favour of this Claim, were the *two By Laws* of the Stationers Company ; the former, made in *August 1681* ; the latter, in *May 1694* ; The former, recognizes it. It asserts *, that divers of the Members of the * V. ante, Company had great Part of their Estates in Copies ; and that p. 2306, by the ancient Usage of that Company, when any Books or 2307. Copies were entered in their Register of any of the Members of that Company, such Persons were always reputed the Proprietors of them, and ought to have the sole printing of them. The next is the same †, only with this additional Entry (after these two Recitals,) and reciting “ that the Copies were constantly bargained and sold, amongst the Members of the Company, as their Property ; and devised to the Children and Others, for Legacies, and to their Widows, for their Maintenance ;” It is *ordained*, that when any Entry shall be duly made of any Book or Copy, by or for any Member

† V. ante,
p. 2308.

Member of the Company ; in such Case, if any other Member shall, without the Licence or Consent of the Member for or to or by whom the Entry is made, print, import, or expose to Sale, &c, They shall for every Copy forfeit Twelve Pence.

The View of inserting these By-Laws in the Special Verdict, was, first, to draw from the Preamble, something in *Favour* of Copy Rights ; and, in the second Place, to shew that these Rights were *protected* by these By-Laws.

With Respect to the first —— Whatev^{er} these By-Laws, have or might have suggested in *Favour* of this Claim, they would be certainly *no Evidence* at all. They are *confined to the Members* of that Company, and could not be read against the present Defendant, who is *no Member* of their Company, nor subject to their By-Laws. They are *confined* too to such Books as are entered in the Register-Book of that Company by to or for some Member of the Company : And this is founded on the ancient Privilege of *that Company* ; and can only affect their *own Members*.

So *peculiar* a Claim is so far from being a Proof of a *Common-Law* Right, that it is an Argument *against* it. For, if such a Right existed by the *Common Law of the Land*, it could not be spoken of as subsisting only by *Usage of the Company*.

But we are on a Question of *LAW* : And *that* is only to be determined on *legal Principles*, and *not* upon the Allegation of a particular Set of Men. Here is a Question, “ Whether this or that Article of Property belongs to *A*. or *B*.” And upon a *general Question*, “ Whether such a Thing is the *Subject of Property*, or does *freely belong to all*,” it is the *LAW* that must determine ; *not* the *By-Laws* of the *Company of Stationers*.

It would be strange indeed, if this great Point which the Courts of Law have thought *so arduous* to determine, were to be decided at last by the Opinions and Resolutions of the *Stationers Company*.

With respect to the second View of inserting these By-Laws in the Special Verdict ; namely, “ the shewing that these Rights of Authors were protected by these By-Laws ” — These by-Laws seem as deficient in this View, and as little capable of establishing this Point, as they were in the former View, and in Support of the Right itself.

These By-Laws, in the first Place, have no Relation to the Claims of *Authorship*. The Copies they refer to, are *only* those Copies

Copies which particular Members of the Stationers Company had the Privilege to print ; either by Patents to Themselves, or by Licence of the Stationers Company. In the next Place, they do not give protection, they do not pretend to give protection, to any but those of their own Company. The Offence of infringing those Rights, and the Penalties inflicted, are confined to their own Members only : And the Penalty is given to the Company * Themselves. The Whole is nothing more * v. ante, than a Corporate Regulation of their own Company. Many p. 2307, Members of that Company were possessed of Copies ; and 2308. Others, of particulat Allotments from the Company for the sole printing of their own Books : And, to preserve proper Order amongst themselves : the Books, that each Member was allowed to print, were entered in their Register ; that every One's Claim might be known among Themselves, and they might not intrude upon Each Other's Right.

But these Entries and By-Laws extended no further than to the Members of that Company. No Author whatever had from them, the least Pretension to Copy-Right. And even these Members themselves could have no Redrets against Strangers ; but only amongst Themselves. These By-Laws provided no Remedies against other Persons : Nor indeed had the Company a Right to impose their Restrictions on any but their own Body. Where then is that Copy Right of Authors, which they plead for ? Or that general Protection which these By-Laws have been imagined to afford to them ?

But other Things were urged at the Bar, and several other Matters were substituted, to account for the Want of Judicial Determinations in Favour of this Claim ; As, the Charters of the Stationers Company ; two Proclamations of H. 8. and Queen Mary ; two Decrees in the Star-Chamber ; two Ordinances made in the Time of the Usurpation ; and the Licensing Act of 13 & 14 of C. 2.

These extraordinary Acts of State were quoted as giving Protection to Copy Rights, and to account for the Want of Judicial Determinations. But None of them, except the Statute, come regularly before Us ; so that we can properly take Notice of them.

If these were material to the deciding this Question, they should all, I apprehend, excepting the Licensing Act of C. 2. have been found by the Jury. For, all the Rest are particular instruments ; and if admissible at all, they were Matter of Evidence, and not of Law : They could not come properly before Us by Way of Argument, from the Bar ; nor can we regularly take Notice of them, upon the Bench.

But

But I mention this merely for the Sake of Precedent and Regularity; meaning, at the same Time, to wave all Objections of this Sort, and to consider the several Instruments themselves.

First, As to the *Charters of the Stationers Company*—The chief Stress was laid on the Clause in the Charter of 36 C. 2. which mentions the *Proprietors of Copies* entering their Books or Copies in the Register-Book of the Stationers Company; and declares that they should thereupon have the *same Right* as had been usual for One Hundred Years past.

But the *Proprietors of Books and Copies* to whom this refers, were merely those *Members of the Stationers Company*, who had the *sole printing* of Books by Patent. And we see by their By-Laws, they claim for *Themselves and their Members* a peculiar Privilege in Copies. And there is an *ancient Usage of the Company* referred to and confirmed, as the Usage which existed for One Hundred Years past. It is not pretended, that such Right existed *immemorially*. And whatever these Charters may have suggested, no *Charters from the Crown*, and consequently no *Expressions* in such Charters, could affect the general *Rights of the Subject*. And it would be strange indeed to infer *Usage of Law* from *Grants made to the Stationers Company*.

When the Prerogative made such extraordinary Strides as it did at that Time, the Company were impowered to *search* the Houses of all Printers and Booksellers, and to *seize* all Books that were contrary to any Statute then made or that should be made, &c.

Are we therefore to conclude, or could we draw any Deductions (either legal or historical) that such Search, Seizings or Imprisonments could be legal in themselves? And as to the Protection these Charters gave to *Copy-Rights*—they do not pretend to extend to any Claim of *Copy-Right*; but, to such Persons only as should enter their Books in that Company's Register. But if Authors had any *Common-Law Right*, it would be *equally good*, whether they entered them there or not: For, such Entry can not extend nor abridge that Right, if they really had it.

The Institution “that all Books should be *entered* in that ‘‘ Register,” was merely *political*: The Design of it was, to suppress *seditions, heretical or immoral Books*. The inserting in these Registers the *Claims of Patentees or any Others*, was an original Institution of the *Stationers Company*, and extended no further than their own *Members*. With Respect to all *Others*, these Privileges extended not to *them*. This

This concerned merely their own Government : And their own By-Laws could not extend further than their own Community.

The two Proclamations were issued, One by H. 8. (as despotic a Prince as ever sat upon the Throne;) the Other, by his bigoted Daughter Queen Mary; and relate to other Purposes. The Former was a general Proclamation against the printing any Books whatsoever without a Licence: and that of Queen Mary, from printing what she called heretical Books.

What have these to do with the *Copy-Right of Authors?* These Exclusions extend as much to *One*, as to *Another*: If the Book was offensive, it was indifferent to the Court, whose it was.

The *Patents cum Privilegio* granted the Book to particular Persons, for a certain *Term of Years*.—From hence it was said, “it was no Innovation in Authors to claim this *exclusive Right*.” The Patents that were asserted in this Part of the Arguments, were taken from Ames’s Typographical Antiquities; and were so arbitrary gross and absurd, that One would not have expected such a Quotation. *Growte* had a Patent for the * *Primer of Salisbury Use*; † *Saxton*, for all Maps* Q. Vide and Charts of *England*; and ‡ *Tallis* and *Birde*, and also Ames, d. § *Morley*, for the printing of Musick: and || *Symcocke*, for all 496. Things printed on one Side of a Sheet, or any Part of a Sheet; † V. Ames, provided the other Side was white Paper. In all these Patents^P 541. to there were *Penalties* inflicted; and they had Power given^{544.} temp. Queen Eliz. them to *seize Books*, and *search Houses*. They are too gross, † P. 536, to be argued from: But they exclude all Notion of Proprietary Right. The Grant was given to the *Printers*, Themselves, Queen Eliz. without any Regard to the *Authors*, or new Compositions. § P. 569. The very *Name* of being Patents to *Printers*, and the *Limits* || P. 570. fixed, shew that they exclude all Ideas of a literary Right, and a Property subsisting in the *Author*.

Next, we are told of some Proceedings in the STAR-CHAMBER; a Court the very Name whereof is sufficient to blast all Precedents brought from it. But I will do the Gentlemen the Justice to say, they did not mean to adduce them as *Autorities*: but to apply them as *historical Anecdotes* in their Favour.

It was said, in One of these Decrees*, That no Person*^{23 June, 1585.} Vide and Meaning of any Letters Patent, or Prohibition of any ante, p. known Law of *England*, or other Ordinances laid down for^{23¹²}. the good Government of the Stationers Company, &c. And this Decree was afterwards by the Command of *Jac. 1.* ordered to be put in Execution.

^{† Or 1637,} In 1607 [†], It was Ordered by a Decree, That no Person
 Qu. V. should print any Book, which the Stationers Company should,
 ante, p. in their Books, prohibit; and which that Company should,
^{2313.} by Letters Patent, have a Right of Printing.

Such were the Edicts of that imperious Court. And is it possible to apply this *despotic Decree* to the *legal Rights of Authors*, in *any Right*? *Tyrannical and illegal* as the Star-Chamber was, the *sole Jurisdiction* they possessed was in *Criminal Matters respecting Books*; and these only, (as their Decree mentions,) in such as were *bad*.

They considered all Infringements of Patents and Grants of the Crown, as *Contempts of Royal Authority*: and on that Idea they supported any Patent the Crown thought proper to

^{I See 3 Inst. grant.} For, as Lord Coke [†] observes, " such Boldness the 182, 183.

" Monopolists took, that often at the Council-Table, Star-Chamber and Exchequer, Petitions, Informations and Bills " were preferred, pretending a contempt for not obeying " the Commandments and Clauses of the said Grants of Mo- " nopolies, and of the Proclamations concerning the same."

For preventing which Mischief, Lord Coke says, that Branch of the Statute was added, which directs, " That all Grants " of Monopolies shall be tried and determined by and oc-

" cording to the *Common-Law*." In that of 21 James the

^{* Cap. 3.} First, a Proviso was contained, " that it should not extend

^{† The 5th} " to any Patent of Privilege concerning [†] Printing." There-

^{Proviso: V.} fore, as to these Patents, the Star-Chamber continued the

^{3 Inst. 185.} same usurped Power of enjoining Obedience, and punishing Contempts.

But the Decrees of this arbitrary Court can not be applied, either judicially or historically, to *civil Cases*, or (more particularly) to the *present Case*.

Of such Kind of Patents the Stationers Company were the Ingrossers. Some assumed Claims and Authorities were allowed to them, for the printing of particular Books. They were of Service to the State in suppressing any seditious Books: And so that Authority in them (however unwarrantable in itself) was preserved to them; and the Star-Chamber secured it to them.

By the Charter of Queen Mary, the Company of Stationers were made a kind of literary Constables, to seize all Books that were printed contrary to the Statute, &c. And, as Mr. Yorke observed in arguing the Case of *The University of Cambridge v. Baskett*, when once the Company were made absolute, they attempted to execute such Outrages that no body

body could submit to. And the Star-Chamber supported them, and insisted upon Obedience to the Stationers Company. No Book was allowed to be printed, till it was entered in their Register: And consequently, they might stop whatever Publication they pleased. The Star-Chamber was equally zealous in supporting the *Interests*, as the *Powers* of that favourite Company of Stationers: And therefore they exerted the Terrors of their Authority to enforce the *Privilege* which had been granted to them or to any of their Members, by Patents or Charters from the Crown. And this they did, under their *Criminal Jurisdiction*, by assuming a Power, in virtue of it, to punish for *Disobedience* to the *Patents* and *Royal Grants*, which they were possessed of.

They did not otherwise interfere; where there was no Grant or Prohibition, to give them a Colour for it. That Court with all their Extravagance, extended their Jurisdiction in this Matter, only to the Grants of the Crown, or to the Ordinances of the Stationers Company. Can this, then, be any Proof at all of the *inherent Right of Authors* in their Copies of their Works? A Right, which if it exists at all, is an *original independent Right*. Do these Decrees serve for the Protection of such Rights of *Authors*? Are they so conclusive, as to account for and supply the Want of any other Determination in their Favour; when the *whole Right* which was the Subject-Matter of them, is confined to the Stationers Company, or to those that had *Patents from the Crown*?

The next favourite Topic of the Plaintiff's Counsel was the Ordinances made by the Houses of Parliament. But they were calculated to political Views; except what related to the Stationers Company: And no Protection is given by them to the Copy-Rights of *Authors in general*. What related to the Stationers Company is adapted to the particular Privileges of that Company and its Members. The Ordinance in 1649, is, "That no Person should print or reprint any Book "or any Part of a Book that was granted to the Stationers "Company, without their Consent; nor any Book or Part "of a Book which was entered in their Books to or for any "Member of the Company, without the Consent of the "Owner, &c." The Design was to stop the Publication of those Papers which the Royalists published.

The Title of the other Ordinance * was for stopping unlicensed, scandalous Publications &c: And therefore it is enacted, "That no Book should be published, unless it was *ap. ante, p. proved by the Licenser.*" And by the same Ordinance, the Stationers Company were authorized to search for all unallowed Printing Presses employed in Printing unlicensed Books, &c.

The

The whole of these Ordinances, from the Beginning to the End, were adapted to the same political Views; except that particular Clause which is entirely confined (like the Star Chamber Decrees) to the Privileges which had been granted to the Stationers Company, and the particular Claims of their Members.

But there is not a Clause that states or protects the Copy-Right of *Authors*.

The Statute of 13 & 14 C. 2. c. 33. (the Licensing-Act,) was next mentioned at the Bar: And the Plaintiff's Counsel argued that it contained a Recognition of the Copy-Right, and such a Protection to *Authors*, that they need not to seek any other. In Proof whereof three Clauses of that Act were quoted. In the 8th Section, is a Proviso to save the Rights and Privileges of the Universities touching the licensing or printing of Books. By the third Section, no private Person may print any Book, unless it be entered in the Stationers Company's Register-Book, and licensed, &c. The twenty-third Section contains a Proviso to save the Rights and Privileges of particular Persons who have Grants from the Crown, according to their respective Grants.

But how will these Clauses avail those *Authors* who are not Members of the Stationers Company, nor have any particular Grant of an exclusive Privilege? Or if the Author had failed to enter his Book in the Register-Book of the Company of Stationers, What Relief or Redress could he have had?

For my own Part, I cannot collect from any of these several Instruments, any Authorities that favour the present Plaintiff. They were no Security to the Copy-Rights of Authors in general: Nor can they account for the Want of legal Determination in favour of the Plaintiff's Claim. The Patents were enormous Stretches of the Prerogative, to raise a Revenue, and to gratify particular Favourites, without the least Regard to *Authors* and new Compositions. And all the Rest of these Authorities were founded on political Views, to prevent (as they declare) heretical and seditious Publications &c. And the Orders "that all Books should be entered in "the Register of the Stationers Company," were to prevent improper Publications; and have no View to establishing the Right of Copy to *Authors*. The Innocence or Delinquency of the Work, and not any private Property in the Authors, were the Object of their Inquiry. If the Licenser did not approve the Copy, he could stop the Author himself from publishing his own Composition. The Institution of the Licenser's Office was, to guard against improper political Publications.

The

The *By-Laws of the Stationers Company* protect *None* but their own Members.

What Security then were all these Instruments for the *Copy-Right of any Author?*

I might also observe upon all these Instruments, that these express Prohibitions plainly imply "that Authors had no Protection at Common Law:" For, if they had, it would have been, alone and of itself, a competent Protection to them; and all these Prohibitions would have been needless.

I am now come to the last Report of the Plaintiff's Counsel for supporting their Claim: And that is, the *Injunctions* that have been granted by the Court of Chancery.

Great Attention and Respect is undoubtedly due to the Decisions of a Lord Chancellor: But they are not conclusive upon a Court of Common Law. Had these Injunctions (which were only temporary) been perpetual, they could have no Effect on a Court of Common Law, in a *Common Law Question*.

The Common Law of England must direct the Determination of a Common Law Question. By Common Law Determinations we are bound; and to them we must always adhere: For, these are the proper constitutional Declarations of the Law of the Land. They are so considered, even by the Court of Chancery itself. When any Doubt arises in a Cause in *Equity* concerning a Point of *Common Law*, it is usually referred to the Determination of a Court of Common Law. The very Case now before Us is sent hither for our Determination, because it is a Question of *Common Law*. But the Courts of Law never apply to a Court of Equity for their Decision, in a *Common Law Question*. When the Court of Equity appeals to Us, as a Court of Law, by Reason of its being a *Common Law Question*, it would seem a little strange, if we should go back to that very Court, to inquire their Opinion upon it; or, in other Words, if we should answer the Question they put to Us, by making the very same Inquiry of them. Yet that would in Effect be the Case, if we were to form our Decision of this Question, upon the Arguments and Decisions made in the Authorities that have been cited: It would be grounding our Decision upon what is no Judgment or Authority at all. These Injunctions were but temporary Suspensions, "till the Rights should be determined;" and none of them contain any express Decision whatever.

It was said at the Bar, "that these Injunctions were ac-
" quiesced in, by the Defendants." But no Acquiescence of
the Parties can alter the Law. The Court of Chancery
could have reasoned and concluded from these Arguments, as
well as we: And they would hardly wish Us to draw De-
ductions from their own Decisions. Their sending the
Cause to Us is a decisive Proof "that the Court of Chan-
cery who granted these Injunctions consider this Matter
"as unsettled." And in the Case of *Millar v. Donaldson*,
which was a Case depending upon Common Law, Lord
Northington would not determine the Point; but left it to be
considered as a *Question of Common Law*.

It is plain, then, that after all these Injunctions, the grand
Question it self is still, even in that Court, considered as an
undecided Point.

But as the Plaintiff's Counsel relied so much upon them, I
think it a due Respect to the Gentlemen to examine particu-
larly the Injunctions themselves; and see whether they have
any Sort of Influence upon the Question before Us, or not.

It is unnecessary to comment particularly on *every* Injunc-
tion that has been mentioned. They may be reduced to these
three Classes: 1st, Causes on private Trespass; *surreptitiously*
or *treacherously* publishing what the Owner had never made
public at all, nor consented to the Publication of; 2dly, Cases
expressly grounded upon the Statute of Queen Ann, and *within the Terms* which that Statute has granted; and 3dly, Cases
on Patents from the Crown for the sole printing what is called
Prerogative Copies.

Of the first Class, were the Cases of *Webb v. Rose*, *Pope v. Curl*, *Forrester v. Waller*, *The Duke of Queensbury v. Shebbeare*—They have been all stated. I will not restate them;
but only observe that in all these Cases the Publications were
surreptitious, against the *Will* of the Owner, *before* he had con-
sented to the Publication of them: And, *as such*, they will
have no Effect upon the *present Question*.

Most certainly, the *sole Proprietor* of any Copy may deter-
mine *whether* he will *print* it, or *not*. If any Person takes it
to the Prefs without his Consent, he is certainly a *Trespasser*; though he came by it by *legal Means*, as by *Loan* or by *De-
volution*: For, he transgresses the *Bounds* of his *Trust*; and therefore is a *Trespasser*.

Ideas are free. But *while the Author confines them to his
Study*, they are like Birds in a Cage, which *none but he can
have*

have a Right to let fly: For, till he thinks proper to emancipate them, they are under his own Dominion.

It is certain every Man has a *Right to keep* his own Sentiments, if he pleases: He has certainly a Right to judge whether he will make them *public*, or commit them only to the Sight of his Friends. In that State, the Manuscript is, in every Sense, *his peculiar Property*; and no man can take it from him, or make any Use of it which he has not authorized; without being guilty of a *Violation* of his Property. And as every Author or Proprietor of a Manuscript has a Right to determine whether he will publish it or not, he has a Right to the *first Publication*: And whoever deprives him of *that Priority* is guilty of a manifest *Wrong*; and the Court have a Right to *stop* it. But this does not apply to the present Question: This Author had *published* it many Years, and received the *Profit* of it.

The second Class of Injunctions in the Manner I ranged them, relates to Injunctions on the Statute of Queen *Ann*. The Case of *Knapton v. Curl*, *Eyre v. Walker*, *Motte v. Faulkner*, *Gill v. Wilcox*, *Tonson v. Walker*, were all the Injunctions, I think, that have been cited, which fall in this Division.

As to the Cases of *Nelson's Fasts and Festivals*, and the Whole Duty of Man, I shall let them remain with the Observations that have been made upon them by my learned Brothers; with this additional one, that let the Injunctions be what they may, they were *only till the Hearing*, without any *final decisive Judgment*.

There had appeared some Doubts, (for I have seen Copies of all those Injunctions that were stated in the Plaintiff's Bill,) as to the Whole Duty of Man; because the Copyright was entered in the Stationers Register by the Plaintiff himself. In 1735 *he filed his Bill, and founded it upon the Statute of Queen *Ann*: (Whether mistaken, or not, is not at all the Question.) And in the Case of *Nelson's Fasts and Festivals*, there is the like Allegation, "That it was entered "in the Stationers Company's Register." But, as I do not apprehend that either of them will very materially affect the present Question, for the Reason I set out with in the general Observations I have made; I shall not say any more of them; but leave them with the Observations my Brethren have made upon them.

But with Respect to *Milton's Paradise Lost*, I must mention what I have seen in a Note of Lord *Hardwick's*. It seems from that, that the Injunction was founded on Dr. *Newton's Notes*, only. For, his Lordship said "that at first

" he was inclined to send the Cause to the Judges, to settle the Point of Law : But, as Dr. Newton's Notes were manifestly within 8 Ann, he would grant an Injunction as to them, without deciding the general Question of Property at Common Law."

But from these Injunctions the Plaintiff's Counsel deduced this Argument, in their Application of them to the present Case, " That all these Injunctions granted since the Statute were founded on a *supposed Property* in the respective Plaintiffs, and a *legal Right* in the several Copies to which they related ; and that such a Property must necessarily be a Property at *Common Law* ; as the Statute consists only of *penal Provisions*, and prescribes the *Mode* of Prosecution, which Mode the Plaintiffs in those Cases had not followed."

To which it might be answered, " that these Injunctions, being temporary only, decided *Nothing at all*."

But I will admit, that they were founded on a Right that would support a more general Injunction : For, by this Act of Parliament they had certainly a Property in those respective Copies, during the Term the Statute has allowed.

* V. 8 Ann. For, the Statute in the first Place, and * before any of the C. 19. sect. 1. penal Provisions, has affirmatively and distinctly enacted " that in any Books printed before the making that Statute, the Author, or the Bookseller who had purchased the Copy in order to print or to reprint it, should have the sole Right of printing the same for Twenty one Years ; and that in Works not then published, but afterwards to be published, they should have the Right for Fourteen Years."

By this Clause, therefore, a sole Right is positively vested in the Author, during the particular Terms which the Statute has limited.

The subsequent Provisions, indeed, have annexed Penalties, and Forfeiture of the Sheets ; (which are to be damasked.) But the Right is wholly confined to the Parties interested, the Authors and Purchasers of Copies. The Penalties are given half to the Crown, and half to any common Informer that will sue for them.

To the Author, therefore, it is the same as a Lease, a Grant, or any other Common-Law Right, whilst the Term exists ; and will equally intitle him to all Common Law Remedies for the Enjoyment of that Right. He may, I should think, file an Injunction Bill to stop the printing : But I may say, with more Positiveness, he might bring an Action, to recover

recover Satisfaction for the Injury done him, contrary to Law under the Statute.

In the Case of *Ewer v. Jones*, 2 *Salk.* 415. and 6. *Mod.* 26. Lord Chief Justice *Holt* lays it down, "that wherever a Statute gives a Right, the Party shall, by Consequence have an Action at Law, to recover it."

The Author's Remedy is very different from an Informer's prosecuting for the Penalty. The latter must pursue all the Remedies the Statute requires: For, in such a Prosecution, the Charge is for an Offence, and therefore the Offence must be strictly brought within all the Provisions of the Act. But if the Plaintiff only seeks Satisfaction to himself as the Party aggrieved, without prosecuting for any Penalty, there is not, in such Case, any Limitation by the Statute.

I here give my Opinion as a Common Lawyer; not presuming to say what the Court of Chancery would do upon the same Question.

The third Class of Injunctions is of those that have been upon Grants and Patents from the Crown, for the sole printing of what are called Prerogative-Copies. Of this Sort, are *The Stationers Company v. Wright*, and *The Stationers Company v. Partridge*. In these Cases, Injunctions were granted: But these, I apprehend, have no Analogy to the private Right of Authors. The Grantees did, indeed, claim a Right of printing these Copies; but not as the Authors, Compilers or Purchasers; but merely as the Printers of these Books, under a Patent from the Crown.

The present Claim is totally different from that of a Grant from the Crown. Here it is argued, "that Authors have a perpetual Right to their own Copies." In that Case of *Partridge*, he was enjoined from printing an Almanac of his own compiling.

The Grand Argument that was drawn from these Injunctions is this—"That there are certain Books, such as the Bible, Common-Prayer Book, Acts of Parliament, and the like, which are usually called Prerogative Copies, which the Crown has the sole Right of publishing: And if the King may have a legal Property in these, there is no Reason why private Authors may not claim a sole Right in their own Compositions."

"That there is such a Right in the Crown," is undoubtedly true. But this is confined to Compositions of a particular Nature; and to me seems to stand upon Principles entirely different from the Claim of an Author. It is not from any

any Pretence of *Dominion over Printing*, that this *Prerogative Right* is derived ; For, the Crown has certainly *no Right of Control* over the Press. But it is to *particular Copies* that this Right does extend : And as *no other Person* is permitted to publish them, without *Authority* from the Crown, the King is said to have a *Property* in them.

This Kind of Property has always the additional Distinction of *Prerogative Property*. The Right is grounded upon *another Foundation*; and is founded on a Distinction that can not exist in common Property, and in the Case of a Subject.

The Books are Bibles, Common-Prayer Books, and all Extracts from them, (such as Primers, Psalters, Psalms,) and Almanacs. Those have Relation to the National Religion or Government, or the political Constitution. Other Compositions to which the King's Right of Publication extends, are the Statutes, Acts of Parliament, and State Papers. The King's Right to all these is, as Head of the Church, and of the political Constitution.

In the Case of *The Company of Stationers v. Lee and others*, which is reported in 2 Shower 258, it is urged that, as the King is the Head of the Church, he has a particular Prerogative in printing of Primers, Psalters, Psalms, &c.; and in restraining and licensing Prognostications of all Sorts.

In the Case of *The Stationers Company v. Wright*, (which was for importing, and printing Psalms, Psalters and Almanacs,) the Words of the Injunction are these—“ This Court, “ in Respect to the well and true printing of Psalms, Psalters and Almanacs, as it is of great Concern to the Public, “ and of great Danger to have these Books printed in a foreign Nation, by any besides the Patentees and their Agents, &c.”—And therefore an Injunction was granted.

In the Case of *The Stationers Company v. Partridge*, the Company grounded their Plea on a Right from the Crown, being licensed by the Archbishop of Canterbury, for printing Almanacs.

In the Case of *The Stationers Company v. Seymour*, The Court assigned these Reasons—‡ “ That there was no Difference in any material Part, between that Almanac of *Gadbury's*, and that that is put in the Rubrick of the Common-Prayer Books.” They said, “ the latter was first settled by the *Necene Council*; is established by the Canons of the Church; and is under the Government of the Archbishop of Canterbury: So that Almanacs may be accounted *Prerogative Copies*.”

And

And in a subsequent Part of their Opinion, the Court observed †, "that since Printing has been invented, and is be-^{V. 1 Mod.} come a common Trade, Matters of State and Things that ^{258.} concern the Government were never left to any Man's Liberty to print, that would."

The Case of the Company of Stationers, 2d Chancery Cases 76, and again in Page 93 of the same Book, was this — The Company had a Patent for Printing the Statutes. The Defendant had some Books of the Statutes printed at *Amsterdam*, and imported them. The Lord Chancellor determined that Printing the Laws was a Matter of State, and concerned the State. But as for the Whole Duty of Man and such like Books, the Lord Chancellor left them to the ordinary Course. It is asserted in Page 93, "that the Defendant was not suffered to print these Books, because it was of great and public Consequence for Strangers to print and vend in *England*, our Statutes and Laws, if falsely done."

In the Case of *Millar v. Donaldson*, which was before Lord *Northington* in 1765 † his Lordship observed, "that ^{Vide ante p. 232.} in the Cases which had been determined in Favour of the Stationers Company, the Court went upon the Letters Patent."

Upon the whole of this Prerogative Claim of the Crown, it appears to me, that the Right of the Crown to the sole and exclusive printing of what is called *Prerogative Copies*, is founded on Reasons of Religion or of State. The only Consequences to which they tend are of a national and public Concern, respecting the established Religion, or Government of the Kingdom; and have no Analogy to the Case of *private Authors*. There is no Instance of the Crown's intermeddling with, or pretending any such Right in private Compositions.

It is necessary in all these Claims, that Uniformity and Order be duly observed; and the Subject informed with Precision, how to regulate his Conduct.

The King has Ecclesiastical Jurisdiction: And Power is given to him over these Publications, that no Confusion may be introduced by such as are false and improper.

And as *Printing* has, since the Invention of that Art, been the general *Mode of Conveying* these Publications, the King has always appointed his *Pinter*. This is a Right which is inseparably annexed to the King's Office: But no such Right is annexed to the Situation of any *private Author*. The King

King does not derive this Right from Labour, or Composition, or any one Circumstance attending the Case of *Authors*.

It is mentioned as One Ground of the King's Right to print them, "that some of these Prerogative Books were composed at his Expence." But in Fact, it is no private Disbursement of the King, but done at the Public Charge, and Part of the Expences of Government. It can hardly be contended, that the Produce of Expences of a public Sort are the *private Property* of the King, when purchased with public Money. He can not sell nor dispose of One of those Compositions. How, then, can they be his *private Property*, like the *private Property* claimed by an Author in his own Compositions?

The Place or Employment of *King's Printer* is properly an *Office*: It was formerly granted by *that Name*, with a Fee annexed to it: and the Person appointed to it, *sworn into Office*.

From these Authorities, therefore, I say, it seems to me, that the King's Property in these particular Compositions called Prerogative Copies stands upon different Principles than that of an *Author*; and therefore will not apply to the Case of an Author.

Now as the Plaintiff contends "that this supposed Copy-right is what he is by *Common Law* intitled to," let Us examine what *Species* of Property it is. What *Class* of Property does it fall within?

It can not be contended, "that it is *real* or descendible Estate." If it falls within any Class of Property at all, it must be that Species of Property which the Law calls *Chattels*.

But all Chattel Property consists of Goods, and Debts or Contracts. Now this Right can not be contended for, as a *Debt*. The Defendant, or the Public, are not *Debtors* to the Plaintiff. Nor can it be claimed as a *Contract*: The Defendant never entered into any *Stipulation* about it.

As, then, it can not be claimed as any Species of *Inheritance*, nor yet as a *Debt*, or *Matter of Contract*; there is but one Class more of Property, under which it can be reckoned: And that is *Goods*.

But *Goods* must be capable of *Possession*; and must, of Course, have some *visible Substance*: For, Nothing but what has *visible Substance*, is capable of actual *Possession*.

The

The Author's *unpublished Manuscript* will indeed very properly fall under this Class of Property ; because, *that is corporeal*. But *after Publication* of it, the mere intellectual Ideas are totally *incorporeal* ; and therefore *incapable* of any distinct separate Possession : They can neither be seized, or forfeited, or possessed. If they could be Matter of *Property*, they must be *subject* to the same several Changes of Possession, as Property is subject to ; The same Charges, Seizures and Forfeitures ; the same Circumstances to which all other Chattles are *liable*.

Can the Sentiments themselves (apart from the Paper on which they are contained) be taken in *Execution* for a Debt ? Or if the Author commits Treason, or Felony, or is outlawed, Can the Ideas be forfeited ? Can *Sentiments* be seized ; or by any Kind of Act whatsoever, be *vested in the Crown* ? If they can not be seized, the sole Right of Publishing them can not be confined to the Author : For, the Ideas of Forfeitures must ever attend the Ideas of *Property*.

How strange and singular must this extraordinary Kind of Property be ; which can not be visibly possessed, forfeited, or seized ; nor is susceptible of any external Injury, nor (consequently) of any specific, or possible Remedy !

But it was said, " that this is a Kind of *special Right*, to a particular Interest, to a particular Privilege."

Now, by the Laws of *England*, there can be no special Right, no particular Interest or Privilege whatever, of *perpetual Duration*, but such as have Respect to some Kind of *Inheritance*. Nothing but an *Inheritance* can support a perpetual subsisting Right. All *personal Property* is total and absolute ; susceptible of no collateral Right, or partial Interest ; excepting for a Time, as in the Case of a *Loan*, or the like.

And here, *another Reason* occurs, why the Right now claimed can have no Existence in the *Common Law of England* : And that is, that the whole of this Right, in its utmost Extent, is a mere *Right of Action* ; a Right of bringing an *Action* against those that print the Author's Work without his Consent. And this *Action* is merely vindictive : It is *in Personam* ; not *in Rem*.

Now there is no Maxim in our Law more clear and plain than this, " that *Things in Action* are not *affinable*."

The Law is too tenacious of private Peace, to suffer Litigations to be *negotiable*. And yet the present *Action* is founded

founded on the *Assignment* of such a Right to sue. This is the Right which the Author has assigned to the Purchaser of the Copy, the present Plaintiff; and upon which Assignment, he brings this Action *in Personam*.

The *Legislature* indeed may *make a new Right*. The *Statute of Queen Ann* has vested a *new Right* in Authors, for a *limited Time*: And whilst that Right exists, they will be established in the Possession of their Property.

But we are now considering a Question at *Common Law*: And at *Common Law*, even *Debts* are not assignable so as to enable the Assignee to bring an Action in his *own Name*. However, the present Action is a *Tort* only: And no *Tort* is assignable, in *Law* or *Equity*. It is not within *any Species* of Actions at *Common Law*.

It seems to me, that this Claim will not fall within any one known Kind of Property at *Common Law*; and can not, therefore, be a *Common-Law Right*.

The Whole Claim that an *Author* can *really make*, is on the *public Benevolence*, by Way of Encouragement; but not as an absolute *coercive Right*. His Case is exactly similar to that of an *Inventor of a new Mechanical Machine*: It is the Right of every Purchaser of the Instrument to make what Use of it he pleases. It is, indeed, in the Power of the Crown to grant him a Provision for a *limited Time*: But if the Inventor has no Patent for it, every One may make it, and sell it.

Let Us consider, a little, the Case of *mechanical Inventions*.

Both original Inventions stand upon the *same Footing*, in Point of *Property*; whether the Case be *mechanical*, or *literary*; whether it be an *Epic Poem*, or an *Orrey*. The Inventor of the One, as well as the Author of the Other, has a Right to determine "whether the World shall see it " or not." And if the Inventor of the Machine chooses to make a Property of it, by selling the Invention to an Instrument-Maker, the Invention will procure him Benefit. But when the Invention is once made known to the World, it is laid open; it is become a Gift to the Public: Every Purchaser has a Right to make what Use of it he pleases. If the Inventor has no Patent, any Person whatever may copy the Invention, and sell it. Yet every Reason that can be urged for the Invention of an Author may be urged with equal Strength and Force, for the Inventor of a Machine. The very same Arguments "of having a Right to his own 'Productions,'" and all others, will hold *equally*, in both Cases:

And

And the *Immorality* of pirating another Man's *Invention* is full as great, as that of purloining his *Ideas*. And the Purchaser of a Book and of a Mechanical Invention has exactly the same Mode of Acquisition: And therefore the *Jus fruendi* ought to be exactly the same.

Mr. *Harrison* (whom I mentioned before) employed at least as much *Time* and *Labour* and *Study* upon his *Time-keeper* as Mr. *Thomson* could do in writing his *Seasons*: For, in planning that Machine, all the Faculties of the Mind must be fully exerted. And as far as *Value* is a Mark of Property, Mr. *Harrison*'s Time-Piece is, surely, as *valuable in itself*, as Mr. *Thomson*'s *Seasons*.

So the other Arguments will equally apply. The Inventors of the Mechanism may as plausibly insist, "that in publishing their Invention, they gave Nothing more to the Public than merely the *Use* of their Machines;" "that the Inventor has a *sole Right of selling* the Machines he invented;" and "that the Purchaser has no Right to multiply or sell any Copies." He may argue, "that though he is not liable to bring back the *Principles* to his own sole Possession, yet the *Property of selling* the Machines justly belongs to the Original Inventor."

Yet with all these Arguments, it is well known, *no such Property can exist*, after the Invention is published.

From hence it is plain, that the mere *Labour and Study* of the Inventor, how intense and ingenious soever it may be, will establish *no Property* in the Invention, will establish *no Right to exclude Others* from making the same Instrument, when once the Inventor shall have published it.

On what Ground then can an *Author* claim this Right? How comes his Right to be superior to that of the ingenious Inventor of a new and useful Mechanical Instrument? Especially, when we consider this Island as the Seat of Commerce, and not much addicted to Literature in ancient Days; and therefore can hardly suppose that our Laws give a higher Right or more permanent Property to the Author of a Book, than to the Inventor of a new and useful Machine.

Improvement in Learning was no Part of the Thoughts or Attention of our Ancestors. The Invention of an Author is a Species of Property *unknown* to the Common Law of England. Its Usages are *immemorial*: And the Views of it tend to the Benefit and Advantage of the Public with respect to the Necessaries of Life, and not to the Improvement and Graces

Graces of the Mind. The latter therefore, would be no Part of the ancient Common Law of *England*.

WHEN the Genius of the Nation took a more liberal Turn, and Learning had gained an Establishment among Us, it was then the Office of the *Legislature*, to make such Provisions for its Encouragement, as to them should seem proper. And accordingly they have done so, by the Statute + 3 Ann. c. of † Queen *Ann*; which Lord *Hardwicke* is said to have 19. stiled (in the Case of *Midwinter et al. v. The Scotch Booksellers*) “ an univerſal Patent for Authors.”

Let Us look, then, into that Act of Parliament; and see if We can not find in it, more authentic Declarations of the Law concerning this Right, than in the Charters and By-Laws of the Stationers Company; the Proclamations and Patents of the Crown; the Decrees of the Star-Chamber; the Ordinances made during the Usurpation; or the Licensing Act of C. 2. This Statute of Queen *Ann* was made by a legal and regular Authority, without any Mixture of Political Views.

The Counsel for the Plaintiff were aware how decisive this Statute was against them: And therefore they endeavoured to preclude all Arguments from it. They urged the Saving Clause, in the 9th Section, “ That Nothing in that “ Act shall extend to any Right that the Universities or “ any Persons have in any Book already printed, or after to “ be printed.”

But this saving Clause seems to me to have no View at all to any *General* Question of Law, or to any *General* Claim. It is not meant as a Saving of any Right or Claim which *Authors* might have at *Common Law*. That would have rendered the whole Act of Parliament of no Effect at all, and defeated the very End for which it was made. It is only pointed at the printing and re-printing of *particular Books*.

The Design of the Statute was to vest a *temporary Copy-right* in Authors, and to establish that Right for a limited Time. But if it had said, after all, that it should not have any Effect *at all* upon the Possessions of Authors, what a laborious Nullity would it be! The Proviso is, that the Act should not confirm or prejudice any particular Claim. It don't relate to *Authors*; but to the University Privileges of Printing.

The University will hardly be considered as an Author. But the Universities had the Privilege of printing and re-printing particular Books; of which there were several Sorts, (as Bibles, Common-Prayer, and Law-Books;) and the University

versity of Cambridge, a more general Licence: And as some of these Patents might be *disputable*, (as we have lately seen in the Case of *Baskett v. The University of Cambridge*,) and the Patent-Rights stood on a different Foundation from that of the *Copy-Rights vested in Authors*; it was a proper Provision, “that this Act should not affect these particular Claims; nor either establish or abridge the Duration of Patents.”

So, in one of the Ordinances of the Parliament for laying a Restriction on Printing, there is a like Proviso, “That that Ordinance and One made in 1642, should not extend to infringe the just Privileges of the Printers of the two Universities.”

So in the Statute of J. 1. † against Monopolies, there is † 21 J. 1. a Clause, “that it should not extend to any Patents or c. 3. § 10. Grants of Privilege of for or concerning Printing;” that is, that such Patents or Grants should neither be prejudiced nor confirmed by that Statute.

It was said, “that this Statute of Queen Ann was merely declaratory of a Common-Law Right; and that it was accumulative, and only introduced some additional Remedies.”

But to me, from the Title quite to the End of this Act, it seems very clearly to be a plain Declaration “that no such Right exists at Common Law.” The Act seems to me, manifestly designed to *vest* the Property in the Author and Publisher during the Time limited and prescribed by it. The Design seems plainly and professedly to be, to give Encouragement to Learning by some New Advantage; namely, by *vesting* the Copy in the Author and Publisher during a certain Time. The Title is, “An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Time therein mentioned.” And by the enacting Clause, there is a Right given in those already printed, for Twenty-one Years from the 10th of April 1710.

Does not this plainly imply, that they had *no* such Right before the 10th of April 1710? How can it be said, “that this Act *vested* that Right,” if they had the *same* Right before, by Common Law? Why should the enacting Clause particularly provide that after the 10th of April 1710, the Author or Publisher should have the sole Right of printing for Twenty-one Years and no longer, Books then in Print; and for Fourteen Years and no longer, Books then composed but not printed; if they had it *before*?

This

This plainly implies that they had *no such Right before 10th of April 1710*. There is not one Clause, one Expression, throughout the whole Act, that hints at a prior exclusive Right in Authors to an *eternal Monopoly*. The Monopoly is particularly limited to a certain Number of Years, and that it shall continue no longer. The only Prolongation that is given is, that if the Author shall be alive after Fourteen Years, the Privilege shall recur to him for another Fourteen Years. But both these Terms are *created by the Act*; and both of them *limited to Fourteen Years*.

<sup>† V. sect. 4.
(since re-pealed by
12 G. 2. c.
36. § 3.)</sup> This Statute also provided † for limiting and settling the Price of Books. But if Authors had a sole Right to their Copies for ever, What Encouragement would they receive from this Provision? It would be a strange Sort of Encouragement; to abridge an actual Right before subsisting in them; to deprive them of the natural Right (which every other Person has) of fixing the Price of the Goods he sells; and to subject the Value of their Property to the Regulation of Others.

The Penalty does not seem much calculated for the Encouragement of the Author. For the Books are to be forthwith damasked, and made Waste Paper of: And the Forfeiture is to go, One half to the King; the other, to the Informer; but no Part of it to the Author.

Were these the Encouragements which Authors were so anxious to obtain? So little do they regard them, that we scarce ever hear of an Instance of their resorting to those Penalties.

How then can we consider this Act, but as *vesting in Authors a Property in their Works, which they had not before?*

After examining the several Clauses and Expressions contained in it, I cannot but conclude that the Legislature had no Notion of any such Things as Copy-Rights, as existing for ever at Common Law: But that, on the contrary, they understood that Authors could have *no Right in their Copies after they had made their Works public*; and meant to give them a Security which they supposed them *not to have had before*. And that this was the Idea of the Legislature, is plainly discoverable from the Debate before it passed into a Law.

The Booksellers petitioned, "that they might have their "Right secured to them." The Committee expunged that Word; and substituted "vesting," in the Place of "securing," (as it had stood in the original Bill:) And the House

House determined the Title should be “ for the Encouragement of Learning, by *vesting* the Copies of printed Books in the Authors or Publishers of such Copies, during the Times therein mentioned.” And afterwards, when the Lords would have struck out the Clause restraining the Authors with regard to the Price, they came to a Conference. The Commons said, they thought it reasonable that some Provision should be made, “ that extravagant Prices should not be set on useful Books.” And the Lords gave it up. It certainly appeared to the Legislature, that abstractedly from this Statute, Authors had *no exclusive Right whatever*; and consequently, must be very far from having any Pretensions to an eternal Monopoly: But that, as the Act gave them a *temporary* Monopoly for a limited Time, it might be reasonable to make the Provisions and Restrictions contained in it; and they would then have a proper Operation. But if this Act of Parliament was *merely a Recognition of a Common-Law Right*, every Person who had such a Common-Law Right might waive the Benefit of the Act: And then the Restrictions in it would have no Operation, as to them.

Upon the Whole, It seems evident to me, that this Claim can not possibly be maintained on either of the Grounds on which it was argued. That, far from being *warranted* by the general Principles of Property, every one of those Principles are flatly *against* it. That it can not be a Part of the Common Law of England; the Existence whereof is *immemorial*, and long *antecedent* to every Circumstance of literary Claim.

I should have here closed what I had to say; and am indeed ashamed to have taken up so much Time. But the Singularity of my Opinion may seem to require some Apology, as I have the Misfortune to be *alone* in it. I can safely say, that, be it ever so erroneous, it is my *sincere* Opinion. The Grounds on which I have formed it must be judged of, by Others: To me, they appear sufficient.

As the Counsel for the Plaintiff have urged the Unfavourableness of it to Men of Learning, I will add a few Words upon that Topic; and also upon the inconvenient Consequences the Public may feel, in case the Plaintiff’s Claim should be established.

It was argued, “ that this Allowance of a perpetual exclusive Right to Authors would encourage Publications, and be of Use for the explaining and cultivating of Learning and Science.”

It is of Use, certainly, that Learning and Science, and all valuable Improvements should be encouraged, and every Man’s Labour properly rewarded. But every Reward has its proper

proper Bounds : And an entire Monopoly for Fourteen, or if the Author remains alive, for Twenty-eight Years, seems Encouragement enough for his Labours : At least, the Legislature have thought it sufficient Encouragement to them ; and have expressly declared They shall have it *no longer* ;[†] And have we Power to control that Authority ; and to say, in direct Opposition to the Statute, “ that they shall have it “ longer ?—that they shall have it *for ever* ? ” If the Encouragement which the Legislature has given will not satisfy Authors, it is not our Province to extend it further. But I can never entertain so disgraceful an Opinion of learned Men, as to imagine the Proofs of Publication for Twenty-eight Years will *not* content them. I will not believe, “ that Nothing will induce them to write, but an absolute “ *perpetual Monopoly* ; ” “ That they have *no Benevolence* “ *to Mankind* ; *no honourable Ambition of Fame* ; *no Incentive* to communicate their Knowledge to Others, but the “ *most avaricious and mercenary Motives*. ” From Authors so very *illiberal*, the Public could hardly expect to receive much Benefit.

On the other Hand, let us look to the Consequences of establishing this Claim. Instead of tending to the Advancement and Propagation of Literature, I think it would stop it ; or at least, might be attended with great Disadvantages to it.

[†] In Donaldson's
Cafe.

It was a just Observation of Lord Northington[†], “ that it “ might be *dangerous* to vest an *exclusive Property* in Au-“ thors. For, as that would give them the *sole Right* to “ *publish*, it would also give them a Right to *suppress* : And “ then those Booksellers who are possessed of the Works of “ the Best of our Authors, might *totally suppress* them.” The Public have *no Tie* upon Authors or Booksellers, to oblige them to keep a *sufficient Number* of Copies printed.

It was said, “ that if the Authors or Booksellers did *not* “ take Care to print a *sufficient Number* of Copies, it would “ be *abandoning the Copy*. ”

To me, however, such *Abandoning of Copy* in a Species of Property like this, seems impossible. For, if there is any Abandoning the Property at all, it must be upon *this Foundation*, “ That no Man has a Right to publish the “ *Sentiments* of an Author without his Consent : ” And it is in that Light alone, that an Author can claim the *sole Right* of Publication. Now, suppose an Author should drop all Design of making further Gains to himself, and discontinue the Publication ; he may insist “ the *Sentiments are His*, and no other Person shall publish *his own Thoughts* without his Consent ; and that notwithstanding “ he has published them once, he does not choose they “ should

"should be published any further." And in that Light, what Colour will there be for extorting his Consent, under the Idea of an *Abandonment*?

But admitting this extraordinary Proposition "That an Author may abandon the future Profits of Publication;" (that is, may abandon what he was never possessed of;) we should still find, the Public would be laid under Difficulties, and would be liable to disagreeable Consequences. It must rest on Circumstances capable, not only of erroneous, but arbitrary Interpretations. This must produce Confusion and Danger. What a Hazard must every Man risque, who ventures from mere argumentative Circumstances to infer an *Abandonment*; and under that Idea, proceeds to publish! Whatever Conclusions he may have formed to *Himself*, he knows not what Light it may appear in to *Others*; and, after an expensive Litigation about it, may find it at last determined against him.

But besides these Difficulties—Supposing the Author should continue the Publication, and print a sufficient Number of Copies; but should fix such an exorbitant Price upon his Books, as to lock the Work up from the general Bulk of Mankind; yet it can not be said "He had abandoned his Property." In this Case, all the Learning and all the Advantage would be confined to a Few; and yet the Public has no Remedy against it; and no other Person must presume to publish this Work.

The Legislature were aware of this; and therefore established an Authority in proper Persons, by the Statute of Queen Ann*, to limit and settle the Price of Books. But if Authors and their Assignees were to be allowed a sole Right of publishing, as being out of the Act, and having a distinct and exclusive Right still remaining in them, that Provision would be totally nugatory; and it would be still in the Power of a Bookseller to set an extravagant Price on useful Books.

Can this exclusive Right of Publication, this Monopoly which claims an entire Dominion over it, and puts an absolute Prohibition on every other Person, be deemed an Encouragement to Learning, and to tend to the Advancement and Propagation of it?

There is another Light too, in which the Consequences of the Claim may be highly injurious to the Public: And that is the Restraints it will lay upon the natural Rights of Mankind in the Exercise of their Trade and Calling.

It is every Man's natural Right, to follow a lawful Employment for the Support of himself and his Family. Printing and
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Bookselling are lawful Employments. And therefore every Monopoly that would intrench upon these lawful Employments is a Restraint upon the Liberty of the Subject. And if the printing and selling of every Book that comes out, may be *confined to a few*, and *for ever withheld* from all the *Rest of the Trade*; What Provision will the *Bulk* of them be able to make for their respective Families?

There is yet another *Mischief* that results from this Claim; the Door it will open for *perpetual Litigations*.

*Vide ante p. 2361, 2362. I have before * observed that the dangerous Snares which this ideal Property will lay, as it carries no proprietary Marks in itself: and is not bound down to any formal Stipulations.

So obscure a Property, (especially after the Work has been a long While published) might lead many Booksellers into many *Litigations*: And in such Litigations, many doubtful Questions might arise; such as—"Whether the Author of the "Work did not intend it as a Gift to the Public"—"Whether, since that, he has not abandoned it to the Public"—"And at what Time."—Disputes also might arise among Authors themselves—"Whether the Works of one Author were or were not the same with those of another Author; or whether there were only colourable Differences :"—(A Question that would be liable to great Uncertainties and Doubts.) So, "Whether those who should compile Notes on a Publication, and should insert the Text, should be liable to an Action for it:" Or if the Notes were good,

§ Qu. of this the Author might refuse the Publication of them §.

Part. For, here, I was out of Court all the Encouragements, and all the Advantages that are consistent with the general Right and Good of Mankind. But if a few Minutes. the Monopoly now claimed be contrary to the great Laws of Property, and totally unknown to the ancient and Common Law of England; If the Establishing of this Claim will directly contradict the Legislative Authority, and introduce a Species of Property contrary to the End for which the whole System of Property was established; If it will tend to embroil the Peace of Society, with frequent Contentions; (Contentions most highly disfiguring the Face of Literature, and highly disgusting to a liberal Mind;) If it will hinder or suppress the Advancement of Learning and Knowledge; And lastly, If it should strip the Subject of his natural Right; If these, or any of these Mischiefs would follow; I can never concur in establishing such a Claim.

THE LEGISLATURE have provided the proper Encouragements for Authors; and, at the same Time, have guarded against all these Mischiefs. To give that legislative Encouragement

ragement a *liberal Construction*, is my Duty as a Judge; and will ever be my own most willing Inclination. But it is equally my Duty, not only as a Judge, but as a Member of Society, and even as a Friend to the Cause of Learning, to support the Limitation of the Statute.

I shall therefore conclude, in the Words of the Act of Parliament, " That the Author or Purchaser of the Copy, shall have the sole Right for the particular Term which the Statute has granted and limited; but NO LONGER :" And consequently, That the Plaintiff, who claims a perpetual and unbounded Monopoly, NO LEGAL RIGHT to recover.

Lord MANSFIELD (not intending to go into the Argument) said —

THIS is the first Instance of a final Difference of Opinion in this Court, since I sat here. Every Order, Rule, Judgment, and Opinion, has hitherto been unanimous.

That † Unanimity never could have happened, if we did not among ourselves communicate our Sentiments with great Freedom; if we did not form our Judgments without any Prepossession of first Thoughts; if we were not always open to Conviction, and ready to yield to Each Other's Reasons. † Except in this, and one other Case now depending (by Writ of Error) in the House of Lords, where Mr. Justice YATES differed from the other Three, Every Rule, Order, Judgment, and Opinion, has, to this Day, been (as far as I can recollect) unanimous. This gives Weight and Dispatch to the Decisions, Certainty to the Law, and infinite Satisfaction to the Suitor: And the Effect is seen by that immense Business which flows from all Parts into this Channel; and which we who have long known Westminster hall, behold with Astonishment; the rather, as during this Period, all the other Courts have been filled with Judges of unquestionable Integrity, eminent Talents, and distinguished Abilities.

We have all equally endeavoured at that Unanimity, upon this Occasion: We have talked the Master over, several Times. I have communicated my Thoughts at large, in Writing: And I have read the three Arguments which have been now delivered. In short, we have equally tried to differ. And whoever is Right, Each is bound to abide by and deliver that Opinion which he has formed upon the fullest Examination.

His LORDSHIP observed, that to repeat the two first Arguments, or go over the same Topics again, would be idle and nugatory, when he had already declared " that he read, approved, and previously concurred in them: " And to be particular in opposing or answering the several Parts of the last Argument (though he differed from the Conclusions of it,) would be indecent, and look too much like Altercation.

He therefore only desired to refer to the two first Arguments, without actually repeating them; and that he might be understood as if he had spoken the Substance of them, and fully adopted them. After which, he expressed himself to the following Effect.

From Premisses either expressly admitted, or which can not and therefore never have been denied, Conclusions follow, in my Apprehension, decisive upon all the Objections raised to the Property of an Author, in the *Copy of his own Work*, by the *Common Law*.

I use the Word “*Copy*,” in the *technical Sense* in which that Name or Term has been used for Ages, to signify an *incorporeal Right* to the *sole printing and publishing* of somewhat *intellectual*, communicated by Letters.

1st Admiss. gen. It has all along been expressly admitted, “that, by the “*Common Law*, an Author is intitled to the *Copy of his own Work until it has been once printed and published by his Authority*;” and “that the Four Cases in Chancery, cited for that Purpose, are *agreeable to the Common Law*;” “and the Relief was *properly given, in consequence of the legal Right*.”

The *Property in the Copy, thus abridged*, is *equally* an *incorporeal Right* to print a Set of *intellectual Ideas or Modes of Thinking*, communicated in a Set of Words and Sentences and Modes of Expression. It is *equally* detached from the *Manuscript, or any other physical Existence* whatsoever.

The *Property thus abridged* is *equally* incapable of being violated by a *Crime indictable*. In like Manner, it can only be violated by Another’s printing without the Author’s Consent: Which is a *Civil Inquiry*.

The only *Remedy* is the same; by an *Action upon the Case, for Damages, or a Bill in Equity for a Specific Relief*.

No *Action of Detinue, Trespass quare vi et armis*, can lie; because the *Copy thus abridged* is *equally* a *Property in Notion*, and has *no Corporeal tangible Substance*.

No *Disposition, no Transfer of Paper* upon which the Composition is written, marked, or impressed, (though it gives the *Power to print and publish*,) can be construed a *Conveyance of the Copy*, without the Author’s express *Consent to print and publish*; much less, *against his Will*.

The Property of the Copy, thus narrowed, may equally go down from Generation to Generation, and possibly continue for Ever; though neither the Author nor his Representatives should have any Manuscript whatsoever of the Work, Original Duplicate, or Transcript.

Mr Gwynn was intitled, undoubtedly, to the Paper of the Transcript of Lord Clarendon's History: Which gave him the Power to print and publish it, after the Fire at Peterfoam, which destroyed one Original. This might have been the only Manuscript of it in being. Mr. Gwynn might have thrown it into the Fire, had he pleased. But, at the Distance of near a Hundred Years, the Copy was adjudged the Property of Lord Clarendon's Representatives; and Mr. Gwynn's Printing and Publishing it, without their Consent, was adjudged an Injury to that Property; for which, in different Shapes, he paid very dear.

Dean Swift was certainly Proprietor of the Paper upon which Pope's Letters to him were written. I know, Mr. Pope had no Paper upon which they were written; and a very imperfect Memory of their Contents; Which made him the more anxious to stop their Publication;—Knowing that the Printer had got them.

If the Copy belongs to an Author, after Publication; it certainly belonged to him, before. But if it does not belong to him after; where is the Common Law to be found, which says "there is such a Property before?" All the Metaphysical Subtilties from the Nature of the Thing may be equally objected to the Property before. It is incorporeal: It relates to Ideas detached from any Physical Existence. There are no Indicia: Another may have had the same Thoughts upon the same Subject, and expressed them in the same Language verbatim. At what Time, and by what Act does the Property commence? The same String of Questions may be asked, upon the Copy before Publication: Is it real or personal? Does it go to their Heir, or to the Executor? Being a Right which can only be defended by Action, is it, as a Choise in Action, assignable, or not? Can it be forfeited? Can it be taken in Execution? Can it be vested in the Assignees under a Commission of Bankruptcy?

The Common Law, as to the Copy before Publication, can not be found in Custom.

Before 1732, the Case of a Piracy before Publication never existed: It never was put, or supposed. There is not a Syllogue about it to be met with any where. The Regulations, the Ordinances, the Acts of Parliament, the Cases in Westminster-

minster-Hall, all relate to the Copy of Books *after Publication* by the Authors.

Since 1732, there is not a Word to be traced about it ; except, from the four Cases in Chancery.

Besides, If all *England* had allowed this Property Two or Three Hundred Years, the same Objection would hold, " that the Usage is *not immemorial* :" For, Printing was introduced in the Reign of *Edw. 4th*, or *H. 6th* *.

* See the Note at the End of this Case, as to the particular Time when it was

first introduced to this Kingdom.

From what Source, then, is the *Common Law* drawn, which is admitted to be so clear, in respect of the Copy *before Publication* ?

From this Argument—Because it is *just*, that an Author should reap the pecuniary Profits of his own Ingenuity and Labour. It is *just*, that Another should not use his Name, without his Consent. It is *fit*, that he should judge when to publish, or whether he ever will publish. It is *fit* he should not only choose the Time, but the Manner of Publication ; how many ; what Volume ; what Print. It is *fit*, he should choose to whose Care he will trust the Accuracy and Correctness of the Impression ; in whose Honesty he will confide, not to foist in Additions : With other Reasonings of the same Effect.

I allow them *sufficient* to shew " it is agreeable to the Principles of Right and Wrong, the Fitness of Things, Convenience, and Policy, and therefore to the Common Law, to protect the Copy before Publication."

But the *same* Reasons hold, after the Author has published. He can reap no pecuniary Profit, if, the next Moment after his Work comes out, it may be pirated upon worse Paper and in worse Print, and in a cheaper Volume.

The 8th of Queen Ann is no Answer. We are considering the *Common Law*, upon Principles *before* and *independant* of that Act.

The Author may not only be deprived of any Profit, but lose the Expence he has been at. He is no more Master of the Use of his own Name. He has no Control over the Correctness of his own Work. He can not prevent Additions. He can not retract Errors. He can not amend ; or cancel a faulty Edition. Any One may print, pirate, and perpetuate the Imperfections, to the Disgrace and against the Will of the Author ; may propagate Sentiments under his Name, which he disapproves, repents and is ashamed of. He can exercise no Discretion as to the Manner in which, or the Persons by whom his Work shall be published.

For

For these, and many more Reasons, it seems to me just and fit, "to protect the Copy *after* Publication."

All Objections which hold as much to the Kind of Property *before*, as to the kind of Property *after* Publication, go for nothing : They prove *too much*.

There is *no peculiar* Objection to the Property *after*, except, "that the Copy is *necessarily made Common*, after the Book is once published."

Does a Transfer of Paper upon which it is *printed*, necessarily transfer the Copy, more than the Transfer of Paper upon which the Book is *written* ?

The Argument turns in a Circle, "The Copy is made common, because the Law does not protect it: And the Law can not protect it, because it is made common."

The Author does not mean to make it common : And if the Law says "He ought to have the Copy after Publication." It is a several Property, easily protected, ascertained and secured.

THE WHOLE then must finally resolve in this Question, "Whether it is agreeable to *Natural Principles*, moral *Justice* and *Fitness*, to allow him the Copy, *after* Publication, as well as *before*."

The general Consent of this Kingdom, for Ages, is on the Affirmative Side. The Legislative Authority has *taken it for granted*; and interposed Penalties to *protect it for a Time*.

The single Opinion of such a Man as *Milton*, speaking, after much Consideration, upon the very Point, is stronger than any Inferences from gathering Acorns and seizing a vacant Piece of Ground ; when the Writers, so far from thinking of the very Point, speak of an imaginary State of Nature before the Invention of Letters.

The judicial Opinions of those eminent Lawyers and Great Men who granted or continued INJUNCTIONS, in Cases *after* Publication, *not within 8 Queen Ann*; uncontradicted by any Book, Judgment, or saying : must weigh in any Question of Law ; much more, in a Question of mere Theory and Speculation as to what is agreeable or repugnant to *Natural Principles*. I look upon these Injunctions, as *equal* to any final Decree.

Whoever

Whoever has attended the Court of Chancery, knows that if an Injunction in the Nature of an Injunction to stay W^tife, is granted, upon Motion, or continued after Answer, it is in vain to go to Hearing. For, such an Injunction never is granted upon Motion, unless the legal Property of the Plaintiff be made out; nor continued after Answer, unless it still remains clear, allowing all the Defendant has said. In such a Case, the Defendant is always advised, either to acquiesce, or appeal: For, he never can make a better Defence than is stated upon his own Answer.

This Case is not sent hither from the Court of Chancery, upon any Doubt of theirs. There never was a Doubt in the Court of Chancery, till a Doubt was raised there from Decency, upon a supposed Doubt in this Court, in the Case of Tonson and Collins. There is not an Instance of an Injunction refused, till it was refused upon the Grounds of that Doubt. The Court of Chancery never grant Injunctions in Cases of this kind, where there is any Doubt. Therefore they refused it, when they thought there was a Doubt. That Case was argued twice, with Solemnity: And after the second Argument, it was referred to the Exchequer-Chamber, to be argued before all the Judges.

That Reference did not arise from any Difference of Opinion, or Difficulty among Us. On the contrary, we suspected Collusion; and that if we gave Judgment for the Plaintiff; there certainly would be no Writ of ERROR. We wished to take the Opinion of ALL the Judges. We were afterwards clearly informed of the Truth of the Collusion: And therefore the Cause proceeded no further.

But while it hung under this Appearance of Difficulty, there was sufficient Ground for the Court of Chancery to say, "the Property was doubtful." They did not send it to Law; They left the Party to follow his legal Remedy. A doubtful legal Title must be tried at Law, before it can be made the Ground of an Injunction. Injunctions of this kind are rightly and properly refused. In a doubtful Case, it would be Iniquity to grant them; Because, if it should come out "that the Plaintiff has no legal Title," the Defendant is injured by the Injunction, and can have no Reparation.

If it is agreeable to Natural Principles, to allow the Copy after Publication, I am warranted by the Admission which allows it before Publication, to say, "This is Common Law."

There is another Admission equally conclusive.

It is, and has all along been admitted, " that by the Common Law, the KING's Copy continues after Publication ; and, and that the unanimous Judgment of this Court, in the Case of *Baskett and The University of Cambridge* *, is right." * Mich.

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te, p. 661.

The King has no Property in the Art of Printing. The ridiculous Conceit of *Atkins* was exploded at the Time.

The King has no Authority to restrain the Pres, on Account of the Subject Matter upon which the Author writes, or his Manner of treating it.

The King can not, by Law, grant an exclusive Privilege to print any Book which does not belong to himself.

Crown Copies are, as in the Case of an Author, civil Property : which is deduced, as in the Case of an Author, from the King's Right of Original Publication. The Kind of Property in the Crown or a Patentee from the Crown, is just the same ; incorporeal, incapable of Violation but by a Civil Injury, and only to be vindicated by the same Remedy, an Action upon the Case, or a Bill in Equity.

There were no Questions in *Westminster-Hall*, before the Restoration, as to *Crown Copies*. The Reason is very obvious : It will occur to every One that hears me. The Fact, however, is so : There were none, before the Restoration.

Upon every Patent which has been litigated since, the Counsel for the Patentee, (whatever else might be thrown out, or whatever Encouragement they might have, between the Restoration and Revolution, to throw out Notions of Power and Prerogative,) have tortured their Invention, to stand upon PROPERTY.

Upon *Rolle's Abridgment*, They argued from the Year-Books, which are there abridged, " that the Year Books having been compiled at the King's Expence, were the King's Property, and therefore the printing of them belonged to his Patentee."

Upon *Croke's Reports*, they contended, " that the King paid the Judges who made the Decisions, Ergo, the Decisions were his." The Judges of *Westminster-Hall* thought, they belonged to the Author ; that is, to the Purchaser from, or to the Executor of the Author : But, so far the Controversy turned upon Property.

In *Seymour's Case*, 1 Mod. 256. (who printed *Gadbury's Almanac*, without Leave of the Stationers Company, who had

had a Patent for the sole printing of Almanacs, *Pemberton* resorted to *Property*. He argued (besides arguing from the Prerogative,) "that an Almanac has no certain Author : Therefore the King has the *Property*; and by Consequence, may grant his *Property*." It was far fetched: And it is truly said, "that the Consequence did not follow." For, if there was no certain Author, the *Property* would not be the King's, but *Common*. *Pemberton* was a very able Lawyer; and saw the Necessity of getting at *Property*, if he could make it out.

All the Decrees in Chancery, and the Judgments at Common Law upon *Almanacs*, are now out of the Case, and all the Doctrine of Prerogative rejected, by what was done in the Case of *The Stationers Company and Partridge*.

It came on, in the Year 1709, before Lord *Cowper*, on continuing the Injunction. There is no Report of it, I believe, in Print: At least, I have not seen any. I have read the Bill and Answer. The Bill puts it upon all the Prerogative Notions of Power; and insists, that the King's Patentee had the sole exclusive Right of printing Almanacs. The Answer insists, that these were extravagant illegal Notions; that they were taken up at Times when the Prerogative ran high, and when the dispensing Power was allowed: And it insists, that the Question ought, since the Revolution, to be argued upon proper Principles, consistent with the Rights and Privileges of the subject. The Defendants denied the Authority of all the Cases stated by the Bill, as far as they went upon *Prerogative* Right. Lord *Cowper* continued the Injunction till Hearing. I have Office-Copies of all the Orders and Pleas that were cited: I dare say, I have Thirty or Forty of them. It appears, that these Decrees were all read; and that the Judgment of the House of Lords was read and gone through. Lord *Harcourt* afterwards heard the Cause. He did not choose, in a Case about Almanacs, to decide upon Prerogative. He therefore made a Case of it, for the Opinion of this Court; Lord *Parker* being then Chief Justice. This Court, so far as it went, inclined against the Right of the Crown in Almanacs. But, to this Hour, it has never been determined: And the injunction granted by Lord *Cowper* still continues.

I have *Salkeld's* Manuscript Report (and have had it many Years) of what passed in this Court in the Course of the Argument of this Case of *The Company of Stationers against Partridge*. I do not know whether it is got into Print: I have not seen it in Print. Mr. *York* had a Copy of it, when he argued the Case of *The University of Cambridge and Baskett*. Mr. *Salkeld* argued for the Defendant *Partridge*: Sir *Peter King*, for the Plaintiffs.

I will

I will state to you, so far as is material to the Argument, how they put it, and the only Grounds that they thought tenable.

Mr. *Salkeld*, after positively and expressly denying any Prerogative in the Crown over the Preses, or any Power to grant any exclusive Privilege, says, " I take the Rule, in all these Cases, to be, That where the Crown has a *Property* or " *Right of Copy*, the King may grant it. The Crown may " grant the sole Printing of *Bibles in the English Translation*; " because it was made at the King's Charge. The same Reason holds, as to the *Statutes, Year-Books, and Common-Prayer-Books.*"

Sir *Peter King*, for the Plaintiffs, argues thus—(throwing out, at the same Time, the Things that I have already mentioned; though he don't seem to be very serious in it—) " I argue, that if the Crown has a Right to the Common-Prayer-Book, it has a Right to every Part of it. And the Calendar is a Part of the Common-Prayer-Book. And an Almanac is the same Thing with the Calendar, &c."

Parker, Chief Justice, speaks to Nothing said at the Bar, but only " whether the Calendar is Part of the Common-Prayer-Book." And as to that, he goes Back as far as to the Council of *Nice*; and doubts whether it is, or rather indeed thinks that it is not Part of it: He says, It may be an *Index*, but is no Part of it.

Mr. Justice *Powell* says—" You must distinguish this from " the Common Cases of Monopolies; by shewing some *Property* in the Crown, and bringing it within the Case of the Common-Prayer-Book." And he rather inclined to think, " that Almanacs might be the King's;" because there is a *Trial by Almanacs*.

To which, Lord *Parker* replied, " that he never heard of such a Thing as a *Trial by Almanac*."

They leave it upon this. It stood over, for another Argument, to see if they could make it like the Case of the Common-Prayer-Book. I don't know what happened afterwards: But there never was any Judgment; and though I have made strict Inquiry, I don't find that there was ever any Opinion given.

I heard Lord *Hardwicke* say what Mr. Justice *Willes* has quoted, as to these Arguments from *Property* in support of the King's Right, necessarily inferring an *Author's*.

The Case of *Baskett* and *The University of Cambridge* was then depending in this Court, when Lord Hardwicke made Use of that Expression or Argument : It has, since, been determined. We had no Idea of any *Prerogative* in the Crown over the Press ; or of any Power to restrain it by *exclusive Privileges*, or of any Power to control the Subject-Matter on which a Man might write, or the Manner in which he might treat it. We rested upon *Property* from the King's *Right of Original Publication*.

Acts of Parliament are the Works of the *Legislature* : And the Publication of them has always belonged to the King, as the *Executive Part*, and as the *Head and Sovereign*.

The *Art of Printing* has only varied the *Mode*. And, though Printing be *within legal Memory*, we thought the *Usage* since the Invention of Printing, very material.

Whoever looks into Mr. Yorke's Argument, upon which the Opinion of the Court in that Case in a great Measure went, (I do not say *throughout*, but in a *great Measure*,) will see the great Pains he takes to shew the *Original Property* in the Crown.

Though the King may grant a *concurrent Right* ; (For, in that Case the Grant was of a concurrent Right, and he might grant it to Ten Thousand ; he might grant it to every Member of the Stationers Company ; he might grant it to every Bookseller;) We had no Idea " that the first Edition of " " Acts of Parliament made the Copy *Common*." And yet any Man may transcribe an Act of Parliament, or a Record ; And any Person may make laborious Searches and Abstracts from Records, and have a Right to print them.

Lord Hardwicke had before reasoned in the same Way, in the Case of *Manby and Others* against *Owen and Others*, on 8th of April 1755, relating to the Sessions-Paper. The Plaintiffs had bought the Sessions-Paper from my Lord Mayor, and had (I think) given him an Hundred Guineas for it. And upon an Affidavit " that the Lord Mayor had always ap- " pointed the Printers of that Paper ; and that it was usual " for the Lord Mayor to take a Sum of Money for it ; and " that the Defendant had pirated it ;" Lord Hardwicke con- sidered the Grant as *Property* in the Copy, and granted the Injunction upon the Foot of *Property* ; and never dreamt " that the first Edition of it made it *Common*." This was acquiesced under : And the Defendants were not advised to proceed further. Nothing is more manifest, than that the Injunction proceeded upon the Infringement of the Plaintiff's *Property*: For, as a *Contemp* of the Court of the Old Bailey,

the

the Court of Chancery would not have interfered. But they were of Opinion "that the Copy was transferred to Plaintiff, " and that it was *not made Common* by the first Publication."

If the Common Law be so in these Cases, it must also be so in the Case of an Author. All the Reasoning "that subsequent Editions should be *correct*," holds equally to an Author. His Name ought not to be used, against his Will. It is an Injury, by a faulty, ignorant and incorrect Edition, to disgrace his Work and mislead the Reader.

The Copy of the Hebrew Bible, the Greek Testament, or the Septuagint, does not belong to the King: It is *Common*. But the English Translation he *bought*: Therefore it has been concluded to be *his Property*. If any Man should turn the Psalms, or the Writings of Solomon, or Job, into Verse, the King could not stop the Printing or Sale of such a Work: It is the Author's Work. The King has no Power or Control over the Subject Matter: His Power rests in *Property*. His whole Right rests upon the Foundation of *Property in the Copy by the Common Law*. What other Ground can there be for the King's having a Property in the Latin Grammar, (which is One of his ancientest Copies,) than that it was originally composed at his *Expence*? Whatever the Common Law says of *Property* in the KING's Case from *Analogy to the Case of Authors*, must hold conclusively, in my Apprehension, with regard to AUTHORS.

I always thought the Objection from the * Act of Parliament, the most plausible. It has generally struck me, at first c. 19. ^{8 Ann.} View. But, upon Consideration, it is, I think, impossible to imply this Act into an Abolition of the Common-Law Right, if it did exist; or into a Declaration "that no such Right ever existed."

The BILL was brought in, upon the Petition of the Proprietors, to secure their Property for ever, by Penalties; the only Way in which they thought it could be secured; having had no Experience of any other: there being no Example of an Action at Law tried, or any Idea "that a Bill would lie for an Injunction and Relief in Equity."

An Alteration was made in the Committee, to restrain the perpetual into a temporary Security.

The Argument drawn from the Clause to regulate the ** Sect. 4. Price of Books, can not hold. That Clause goes to all Books; now repealed (by 12 G. 2. c. 36.) is *perpetual*: and follows the Act of H. 8 †.

The § 3.)
† 25 H. S.
c. 15. § 4.

*V. sect. i. The Words “*no longer*”* add Nothing to the Sense; which is exactly the same, whether these Words are added, or not.

† V. Title The Word “*westing*”†, in the Title, can not be argued “*by vest*-from, as declaratory “*that there was no Property before*” “*ing*” &c. The Title is but once read; and is no Part of the Act. In the Body, the Word “*secured*” is made Use of.

Had there been the least Intention to *take* or *declare* away every Pretence of Right at the Common Law, it would have been *expressly* enacted; and there must have been a new *Preamble*, totally different from that which now stands.

But the Legislature has *not* left their Meaning to be found out by *loose Conjectures*. The *Preamble* certainly proceeds upon the Ground of a *Right of Property*, having been *violated*: and might be argued from, as an *Allowance* or *Confirmation* of such a Right at the Common Law. The Remedy enacted against the Violation of it being *only temporary*, might be argued from, as *implying* “*there existed no Right but what was secured by the Act.*” Therefore an *express Saving* is added, “*that Nothing in this Act contained shall extend or be construed to extend to prejudice or confirm any Right, &c.*” “*Any Right*” is, manifestly, any other Right than the *Term* secured by the Act. The Act speaks of *no Right whatsoever, but that of Authors, or derived from them.* No other Right could possibly be *prejudiced* or *confirmed* by any Expression in the Act. The *Words* of the *Saving* are adapted to this Right: “*Book or Copy already printed, or hereafter to be printed—.*” They are not applicable to *Prerogative Copies*. If Letters Patent to an Author or his Assigns could give any Right, they might come under the Generality of the Saving. But, so little was such a Right in the *Contemplation* of the Legislature, that there is not a Word about *Patents* in the whole Act. Could they have given any Right, it was not *worth Saving*; because it never exceeded Fourteen Years.

It was strongly urged, “*that a Common-Law Right could not exist; because there was no Time from which it could be said to attach or begin:*” Whereas the *Statute*-Property was ascertained by and commenced from the *Entry*.

Undoubtedly, the previous Entry is a *Condition* upon which all the Security given by the *Statute* depends:” And if every Man was intitled to print, without the Author’s Consent, before this Act, No Body can be questioned for so Printing since the Act, before an Entry. Nay, The Offence being

newly

newly created, it can only be prosecuted by the Remedies prescribed, and within the limited Time of Three Months.

But the Court of Chancery has uniformly proceeded upon a *contrary Construction*. They considered the Act, *not as* creating a *new Offence*, but as giving an *Additional Security* to a *Proprietor grieved*; and gave Relief, *without Regard* to any of the Provisions in the Act, or whether the Term was or was not expired. *No Injunction* can be obtained, *till* the Court is satisfied “*that the Plaintiff has a clear legal Right.*” And where, for the Sake of the Relief, the Court of Chancery proceeds upon a Ground of *Common or Statute Law*, their Judgments are Precedents of high Authority in *all* the Courts of *Westminster-Hall.*

His LORDSHIP adopted and referred to other Observations made upon the Act by the two Judges who spoke first:— And then concluded thus—

I desire to be understood, that it is upon *this* Special Verdict, I give my Opinion. Every Remark which has been made, as to what *is* and what *is not found*, I consider as *material*. The Variation of any One of the Circumstances *may change* the Merits of the Question: The Variation of *some*, certainly *would*. Every Case, where such Variation arises, will stand upon its *own particular Ground*; and will *not be concluded* by *this Judgment*.

The SUBJECT *at large* is exhausted: and therefore I have not gone into it. I have had frequent Opportunities to consider of it. I have travelled in it for many Years. I was Counsel in most of the Cases which have been cited from Chancery: I have Copies of all, from the Register Book. The first Case of *Milton's Paradise Lost*, was upon my Motion. I argued the Second: Which was solemnly argued, by One on each Side. I argued the Case of *Millar against Kincaid*, in the House of Lords. Many of the Precedents were tried by my Advice. The accurate and elaborate Investigation of the Matter, in *this Cause*, and in the former Case of *Tonson and Collins*, has confirmed me in what I always inclined to think, “*That the Court of Chancery did right, in giving Relief upon the Foundation of a LEGAL Property in Authors*, independent of the Entry, the Term for Years, “*and all other Provisions annexed to the Security given by the Act.*”

THEREFORE my Opinion is—“*That JUDGMENT be for the PLAINTIFF.*” And it must be **entered as *Vide ante,* on the Day of the last Argument of this Case at the Bar. P. 2303.

A Writ of Error was afterwards brought: But the Plaintiff in Error, after assigning Error, suffered himself to be non-pross'd. And the Lords Commissioners, after Trinity Term 1770, granted an Injunction.

In the Case of *Donaldsons against Becket and Others*, the Matter came before the House of Lords, upon an Appeal from a Decree of the Court of Chancery, founded upon this Judgment: And what appears from the Minutes is as follows:-

Die Mercurii, 9 Februarii, 1774, Donaldsons against Becket and Others.

ORDERED, That the Judges be directed to deliver their Opinions upon the following Questions (*viz.*)

1. Whether at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed published and sold the same without his Consent?
2. If the Author had such Right originally, did the Law take it away, upon his Printing and Publishing such Book or Literary Composition: And might any Person afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author?
3. If such Action would have lain at Common Law, is it taken away by the Statute of 8 Ann? And is an Author, by the said Statute precluded from every Remedy, except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby?

ORDERED, That the Judges do deliver their Opinions upon the following Questions (*viz.*)

Whether the Author of any Literary Composition and his Assigns, had the sole Right of Printing and Publishing the same in Perpetuity, by the Common Law?

Whether this Right is any way impeached restrained or taken away by the Statute 8th Ann?

Whereupon, the Judges desiring that some Time might be allowed them for that Purpose,

ORDERED,

ORDERED, That the further Consideration of this Cause be adjourned till *Tuesday* next; and that the Judges do then attend, to deliver their Opinions upon the said Questions.

Die Martis, 15 Februarii 1774.

The Lord Chancellor acquainted the House, That the Judges differed in their Opinions upon the said Questions.

ORDERED, that the Judges present do deliver their Opinions upon the said Questions, *seriatim*, with their Reasons.

Accordingly,

Mr. Baron EYRE was heard upon the said Question—And Mr. Baron Eyre.

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had not the sole Right of first Printing and Publishing the same for Sale: and could not bring an Action against any Person who printed published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That if the Author had such sole Right of first Printing, the Law did take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that any Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Right is taken away by the Statute of 8 Ann.; and that an Author by the said Statute is precluded from every Remedy except on the Foundation of the said Statute: But that there may be a Remedy in Equity upon the Foundation of the Statute, independent of the Terms and Condition prescribed by the Statute, in respect of Penalties enacted thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had not the sole Right of Printing and Publishing the same in Perpetuity, by the Common Law.—And gave his Reasons.

5. Upon the fifth Question, delivered his Opinion—That the Right is impeached restrained, and taken away by the Statute 8th *Anne*.—And gave his Reasons.

M. Justice Then Mr. Justice NARES was heard upon the said Question—
Nares. on—And

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against the Person who printed, published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is taken away by the Statute 8 *Ann*; and that an Author by the said Statute is precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had the sole Right of Printing and Publishing the same, in Perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question delivered his Opinion—That his Right is impeached, restrained and taken away by the Statute 8 *Ann*.—And gave his Reasons.

M. Justice Then Mr. Justice ASHURST was heard upon the said Questions.—And

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed, published and sold the same without his Consent.—And gave his Reasons.

2. Upon

2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is not taken away by the Statute of 8th Ann.; and that an Author by the said Statute is not precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Condition prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had the sole Right of Printing and Publishing the same, in Perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is not any way impeached, restrained or taken away by the Statute of 8th Ann.—And gave his Reasons.

Then Mr. Justice ASHURST delivered the Opinion of Mr. Mr. Justice Justice BLACKSTONE (who was absent, being confined to his Blackstone. Room with the Gout, upon the said Questions.—And

1. Upon the first Question, delivered his opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is not taken away by the Statute of 8th Ann.; and that an Author, by the said Statute, is not precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.

4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had the sole Right of Printing and Publishing the same, in Perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is not any way impeached, restrained or taken away by the Statute of 8th Ann.—And gave his Reasons.

ORDERED. That the further Consideration of this Cause, and hearing the Opinion of the rest of the Judges upon the said Questions, be Adjourned till *Thurday* next; and that the Judges do then attend.

Die Jovis, 17 Februarii 1774.

Mr. Justice Mr. Justice WILLES was heard upon the said Questions.—
Willes, And

1. Upon the first Question delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed, published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is not taken away by the Statute of the 8th Ann.; and that an Author by the said Statute is not precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had the sole Right of Printing and Publishing the same, in Perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is not any way impeached, restrained or taken away by the Statute of 8th Ann.—And gave his Reasons.

Then

Then Mr. Justice ASTON was heard upon the said Ques. Mr. Justice
Aston.
tions—And

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed, published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is not taken away by the Statute of the 8th Ann.; and that an Author by the said Statute is not precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had the sole Right of Printing and Publishing the same, in Perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is not any way impeached, restrained or taken away by the Statute of 8th Ann.—And gave his Reasons.

Then Mr. Baron PERROTT was heard upon the said Ques-

M. Baron
Perrott

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same; but could not bring an Action against any Person who printed, published and sold the same, unless such Person obtained the Copy by Fraud or Violence.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that any Person might afterward reprint and sell, for his own Benefit,

Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.

3. Upon the third Question, delivered his Opinion—That such Right is taken away by the Statute of 8th Ann; and that an Author, by the said Statute, is precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Affigns had not the sole Right of Printing and Publishing the same, in Perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That the Right is impeached, restrained, and taken away by the Statute of 8th Ann—And gave his Reasons.

Mr. Justice Gould. Then Mr. Justice GOULD was heard upon the said Questions—And

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed, published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is taken away by the Statute of 8th Ann; and that an Author, by the said Statute, is precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Affigns had the sole Right of Printing and Publishing the same in Perpetuity, by the Common Law.—And gave his Reasons.

5. Upon

5. Upon the fifth Question, delivered his Opinion—That this Right is impeached, restrained and taken away by the Statute of 8th Ann.—And gave his Reasons.

Then Mr. Baron Adams was heard upon the said Questions.—And

Mr Baron
Adams.

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same; but could not bring an Action against any Person who printed, published and sold the same, unless such Person obtained the Copy by Fraud or Violence—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that any Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Right is taken away by the Statute of 8th Ann; and that an Author, by the said Statute, is precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had not the sole Right of Printing and Publishing the same, in Perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That the Right is impeached, restrained and taken away by the Statute of 8th Ann.—And gave his Reasons.

ORDERED, That the further Consideration of the said Cause be Adjourned to Monday next; and that the Judges do then attend, to deliver their Opinions *seriatim*, with their Reasons, upon said Questions.

Die Lunæ, 21 Februarii 1774.

Lord Chief Baron. The Lord Chief Baron of the Court of Exchequer was heard upon the said Questions.—And

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is not taken away by the Statute of 8th Ann.; and that an Author, by the said Statute, is not precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had the sole Right of Printing and Publishing the same, in Perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is not any way impeached, restrained and taken away by the Statute of 8th Ann.—And gave his Reasons.

Lord Chief Justice.

Then the Lord Chief Justice of the Court of Common Pleas was heard upon the said Questions.—And

1. Upon the first Question, delivered his Opinion—That at Common Law an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed published and sold the same without his Consent.—And gave his Reasons.

2. Upon

2. Upon the second Question, delivered his Opinion—That the Law did take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that any Person might afterwards reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is taken away by the Statute of 8th Ann.; and that an Author by the said Statute is precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had not the sole Right of Printing and Publishing the same, in Perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is impeached, restrained and taken away by the Statute of 8th Ann.—And gave his Reasons.

SO that, of the Eleven Judges, there were Eight to Three, upon the first Question; Seven to Four, upon the Second; and Five to Six, upon the Third.

It was notorious, that Lord MANSFIELD adhered to his Opinion; and therefore concurred with the Eight, upon the first Question; with the Seven, upon the Second; and with the Five, upon the Third. But it being very unusual, (from Reasons of Delicacy,) for a PEER to support his own Judgment, upon an Appeal to the House of Lords, he did not speak.

And the Lord Chancellor seconding Lord CAMDEN'S Motion “to reverse;” The Decree was REVERSED.

The Argument upon the third Question turned greatly upon the Meaning of the Proviso in the 8th of Queen Ann, which saves the Rights of the Universities. It is the 9th Clause, and runs in these Words—“ PROVIDED that no “ thing in this Act contained shall extend or be construed “ to extend, either to prejudice or confirm any Right that “ the said Universities or any of them, or any Person or “ Persons, have or claim to have, to the printing or re- “ printing any Book or Copy already printed, or hereafter “ to be printed.”

THE

* 15 G. 3. THE UNIVERSITIES, alarmed at the Consequences of
 & 53. this Determination, applied for and obtained an * Act of
 Parliament establishing, in Perpetuity, their Right to all the
 Copies given them heretofore, or which might hereafter be
 given to or acquired by them.

MEMORANDUM—

In a former Account of this Case, which (at the Request of several of my most learned and respectable Friends) I communicated to the Public, some Time ago, in a detached Piece, I inserted a marginal Note upon Lord Mansfield's mentioning “that *Printing was introduced* in the Reign of “*Edw. 4th. or Hen. 6.*” which marginal Note was not only unnecessary and improper, but grossly erroneous and false in Fact. I have never been able to recollect or discover what led me into such an egregious Blunder. The only Method that occurs to me of making Compensation for it, is to endeavour to fix with some Degree of Accuracy and Precision, by this present Note, the real and true Times and Persons, when and by whom the Art of Printing was originally *discovered*, and when and how it was afterwards first introduced into this Country.

Very great Honour is certainly due to the ingenious *Inventors* of this most noble and useful Art: And even the Cities where it was attempted to be put in Practice claim some Share of Reputation, frem having given Birth or Residence to the first Discoverors.

HAERLEM, MENTZ and STRASBURGH seem to have the best Pretensions of this Sort, with regard to the *Original Invention*. VENICE has a better Claim to the *Improvement*, than to the first Rudiments. For, *Nicolas Jenson*, who is generally supposed to have first taught the Art of Printing to the Venetians, did not begin Printing there till the Year 1470: And if *John de Spira*'s Claim should be allowed, who says “that HE was the first who had ever printed in “that City,” yet his Pretensions go only a Year or Two further backward. And even admitting that another Book was printed at Venice before *John de Spira*'s “*Cicerio's Epistles ad Familiares*,” in 1469; (namely, “*Fr. Matwanii de Componendis Versibus Hexametro et Pentametro*, by *Ranolt, Venet. 1468*;); yet that would carry it back but One Year more, in Support of the Venetian Claim. Whereas the first Rudiments of the Art, the first rough Specimens, the first Essay with separate wooden Types, if not elsewhere, yet, at least at Haerlem, was about Thirty Years anterior to those Dates. There is indeed some Difficulty in ascertaining the Claim to the first Invention of Arts which, though entirely

entirely owing to the Sagacity of the Inventor, are scarce perfect and complete whilst in Embryo, and kept secret; but when once discovered to the World, soon receive Improvement from other ingenious Men to whom the Original Idea of the Invention never did or ever would have presented itself. So, in the Art of Printing, *Haerlem* and *Menz* both claim the Honour of being the Place where it was first known and practised. Dr. Middleton goes so far as to say, "that it is certain, beyond all Doubt, that Printing was first invented and propagated from *Menz*." Others ascribe it to *Haerlem*. And it is true of Each, in a qualified Sense: if Printing on fusile separate Types be considered as the Invention of Printing. In this Sense, the Improvement is the Title to the Merit of the Invention: But the original Thought and first Attempt belongs to another Person, and probably would never have occurred to the Improver. At *Haerlem*, it was first thought of, by *Laurentius*, about 1430; and practised by him there, with *separate wooden Types*: It was afterwards practised at *Menz*, with *metal Types*, first *cut*, and then *cast*; invented there, by one of the two Brothers of the Name of *Geinsfleisch*; probably by the elder *John Geinsfleisch*, about the Year 1442, when he published his first Essays on Wooden Types, which had not answered his Expectations. However, both the Brothers have been called *Protocharagmatici*: This Invention of printing with *metal Types* was called "*Ars characterizandi*." The *cut metal Types* were further improved by *John Fust*, of *Menz*; who, in 1452, completed the Art, by the Help of his Servant *Peter Schoeffer*, whom he adopted for his Son, and to whom he gave his Daughter in Marriage, *pro digna laborum multarumque ad inventionum remunerazione*. So that the original Foundation of the Art of Printing, in general, seems to have been laid at *Haerlem*; and the Improvements made at *Menz*. As to *Straburgh*, it can have no Pretensions nearly equal to either *Haerlem* or *Menz*. *Gutenberg* endeavoured to attain the Art whilst he resided in that City: And his first Attempts were made in 1436, with wooden Types. But he and his Partners were never able to bring the Art to Perfection. He quitted *Straburgh* in 1444 or 1445; greatly involved in Debt, and obliged to sell all that he had.

THE TRUE ORIGINAL INVENTOR of Printing seems to have been *LAURENTUS* of *Haerlem*, Son of *ohn*, who was Son of another *Laurence*. This *Laurence*, the Grandson, was born at *Haerlem* about 1370; and died in 1440. He was *Adiutus* or *Custos* of the Cathedral of *Haerlem*: and was called *Coster*, from his Office, not from his Family-Name: His Descent is said to have been from an illegitimate Branch of the *Gens Brederodia*. He was a Man of large Property: And his Office was both respectable and lucrative. *Hadrian Junius* gives a full Narrative of the Accident which led *Laurentius* into the happy Train of this useful Invention: (See

(See his *Batavia*, Ed. Lugd. Bat. 1588. p. 253.) This Laurentius being a Man of Ingenuity and Judgment, he proceeded Step by Step, by inventing a more glutinous Ink, and then forming whole Pages of Wood with Letters cut upon them ; pasting the Backsides of the Pages together lest they shoud betray their Nakedness. Then he changed his original beechen Letters, for leaden Ones ; and those again for a Mixture of Tin and Lead, as a les flexible and more solid and durable Substance. His first Works, in one of which (the “*Speculum Salutis*”) he introduced Pictures on wooden Blocks, were printed on *separate moveable wooden Types*, fastened together by Threads. He did not live to see the Art brought to Perfection. He died in 1440, aged 70 ; and was succeeded, either by his Son in Law in *Thomas Peter*, who married his only Daughter *Lucia* ; or by their immediate Descendants *Peter Andrew*, and *Thomas* ; who seem to have been industrious, and printed neatly, with *separate wooden Types*. Their last known Work was printed at *Haerlem* in 1472 : Soon after which, they disposed of all their Materials, and probably quitted their Employment. Laurentius’s Types were stolen, soon after his Death. The Thief was one of his Workmen ; and his Name was *John* ; and there is little Doubt of his being a Native of *Mentz* ; to which Place he conveyed them, and settled there : But it is not so certain, what was his Surname. *John Fust* or *Faust* has been suspected : But it seems to be an unjust Charge upon him. So also, upon *John Gutenberg* ; whose Residence was at *Straisbury*, from 1436 to 1444, endeavouring with fruitless Labour and Expence to attain the Art. Neither does it seem just to suspect *John Meidenbachius*, an Assistant to the first *Mentz*-Printers ; nor *John Petersteinius*, sometime a Servant to *Fust* and *Schoeffer*, and who set up a Printing-House at *Frankfort* in 1459. It is most probable, (all Things being fully considered,) that this dishonest and unfaithful Servant was *JOHN GEINSFLEICH Senior*, Elder Brother of *Gutenberg* ; who was born at *Mentz*, but had resided in other Places. As he stole the Types from *Haerlem* with a View to set up for himself elsewhere, it was natural for him to make Choice of *Mentz*, his Native City—Accordingly, he took the shortest Route, through *Amsterdam* and *Cologne*, to *Mentz* ; where he fixed his Residence, in the Year 1441, and in 1442 published two small works. It is said, in a *Lambeth Record* which will be hereafter taken Notice of, p. 3. “ that *Mentz* gained the Art, by the Brother of one of the Workmen of *Haerlem*, who learnt it at Home of his Brother, who afterwards set up for himself at *Mentz*.” But *Gutenberg*, the younger Brother, never was a Servant to *Laurentius*. It was the elder Brother, who having learnt the Art by being Servant to the first Inventor, stole his Types, and carried them to *Mentz* his Native Country ; And it must be this elder Brother who instructed his younger Brother

Gutenberg

Gutenberg in the Art; which younger Brother first applied himself to the Business at *Straßburg*, and not succeeding there (as has been before mentioned) quitted *Straßburg*, and joined his Elder Brother who had in the mean Time settled at *Menz*.

As to the Imagination of *Specklinus* and the other Chronologer of *Straßburg*, "that *Straßburg* was the Place of the Invention, and *Mentelius* the Person who was the Inventor, and from whom the Types were stolen," it is quite erroneous. *Mentelius* certainly did not begin to print till 1444; probably, not before 1447. *Gutenberg* was an earlier Printer than *Mentelius*: Much more so were *Laurentius*, at *Haerlem*; and *John Geinsleicht Senior*, at *Menz*. *Ulric Zell*, in his *Chronicon Coloniae*, 1499, attributes the Invention, or at least the Completion of the Art, to *Gutenberg* at *Menz*; though he admits that some Books had been published in *Holland* earlier than in that City; and from *Menz*, he says, it was first communicated to *Cologne*; next, to *Straßburg*; then, to *Venice*. There is no certain Proof of any Book having been printed at *Straßburg*, till after 1462: After which Period, Printing made a rapid Progress in *Europe*. In 1490, it reached *Constantinople*; in the Middle of the next Century, it advanced into *Africa* and *America*; and about 1560, was introduced into *Russia*. After this, it was even carried into *Iceland*, the farthest North (as Mr. *Bryant* observes) of any Place where Arts and Sciences have ever resided. This very learned and ingenious Gentleman has in his own Possession a Book written in *Latin* by *Arngrim Jonas*, in his own Country of *Iceland*, and printed "Typis Hollensibus in *Icelandia Boreali*, Anno 1612." This curious little Treatise is intitled "Anatome *Blefkiniana*". Mr. *Bryant* notes, "that *Hola* is, in some Maps, placed within the Arctic Circle; and certainly is not far removed from it."

THIS may suffice, I should hope, to satisfy the Curiosity of the Reader, with respect to the Original Invention of Printing, and its earlier Advances in foreign Countries.

It is now Time to examine how, when, and by whom, it was first introduced into our own.

Concerning this Matter, there are different Accounts.

It was formerly the original Opinion and Belief, and seemed to be agreed by all our Historians, that the Art of Printing was introduced and first practised in *England* by Mr. *William Caxton*, a Citizen of *London*, who had been bred a Mercer, having served an Apprenticeship to *Robert Large* in that Branch of Business: Which *Robert Large* died in 1471, after having been Sheriff and Lord Mayor of *London*; and left

left a Legacy to *Caxton*, in Testimony of his good Character and Integrity. From the Time of his Master's Death, Mr. *Caxton* spent the following Thirty Years (from 1441 to 1471) beyond Sea, in the Business of Merchandise. In 1464, he was employed by King *Edward* the Fourth in a public and honourable Negotiation, to transact and conclude a Treaty of Commerce between that King and his Brother-in-Law the Duke of *Burgundy*.—By his long Residence in *Holland*, *Flanders* and *Germany*, he had an Opportunity of being informed of the whole Method and Process of this Art: And returning to *England*, and meeting with Encouragement from great Persons, and particularly from the then Abbot of *Westminster*, he first set up a Press in that Abbey, (in the *Almonry* or *Ambry*,) and began to print Books soon after the Year 1471, and is said to have pursued his Business there with extraordinary Diligence till the Year 1494; in which Year Dr. *Middleton* says he died; “not in the Year following, as all who wrote of him affirm.” But Mr. *Ames* says, if not proves, that it was no longer than the Year 1491. He was probably upwards of Fourscore Years of Age, when he died. The “*Recuyel of the Historyes of Troye*,” is supposed to have been the first Book that he printed in *England*. Dr. *Middleton* is a very strenuous Advocate for *Caxton*; and professes a Desire “to do Justice to his Memory, and not suffer him to be robbed of the Glory so clearly due to him, of having first imported into this Kingdom an Art of great Use and Benefit to Mankind; a Kind of Merit that, in the Sense of all Nations, gives the best Title to true Praise, and the best Claim to be commemorated with Honour to Posterity.” The Doctor states the positive Evidence in Proof of his Assertion, as well as the Negative and Circumstantial: And he observes “that all our Writers before the Restoration, who mention the Introduction of the Art amongst us, give *Caxton* the Credit of it, without any Contradiction or Variation.” He cites *Stowe*, *Trussell*, Sir *Richard Baker*, *Ieland*, and *Howell*, and the more modern Authorities of Mr. *Henry Wharton* and M. *Du Pin*; all strong in Favour of his Opinion.

In Opposition, however; to all these great and seemingly invincible Testimonies and Authorities on behalf of Mr. *Caxton*, a Book which had been scarce observed before the Restoration, was soon after that Time taken Notice of, and looked upon as a strong Argument, if not a full and clear Proof, “that the Art of Printing had been exercised in the University of *Oxford*, before *Caxton* exercised it at *Westminster*, in 1471.” This Book bears for its Title, “*Expositio Sancti Jeronimi in Simbolum Apostolorum ad Papam Laurentium;*” and at the End—“*Explicit Expositio, &c. Impressa Oxonie, & finita Anno Domini MCCCCCLXVIII. xvii. die Decembris.*” Yet History was quite silent about this

this very remarkable Fact of a Printing in *England* prior to Caxton's; nor was there any Memorial to be found in the University, of a Circumstance so honourable to them, and so beneficial to Literature. It has been urged, that notwithstanding this long Silence concerning such a very extraordinary Event, the Matter is now cleared up, by the Discovery of a Record which had long lain obscure and unknown at *Lambeth-Palace*, in the Register of the See of *Canterbury*; which Record contains a *Narrative* of the whole Transaction, drawn up at the very Time. An Account of this Record was first published by *Richard Atkins*, Esq. in the Beginning of 1664, in his "Original and Growth of Printing, " collected out of History and the Records of this Kingdom." It sets forth, "that *Thomas Bourchier*, Archbishop of *Canterbury*, moved King *Henry the Sixth* to use all possible Means for procuring a Printing-Mould to be brought into this Kingdom. The King readily hearkened to this Motion; and, taking private Advice how to effect his Design, concluded that it could not be brought about without great Secrecy and a considerable Sum of Money given to such Person or Persons as would draw off some of the Workmen of *Haerlem* in *Holland*, where *John Cuthenberg* had newly invented it, and was himself personally at Work. It is resolved, that less than One Thousand Marks would not produce the desired Effect: Towards which Sum, the said Archbishop presented the King Three Hundred Marks. The Management of the Design was committed to Mr. *Robert Turnour*, of the Robes to the King, and much in Favour with him. Mr. Turnour took to his Assistance Mr. *Baxton*, a Citizen of good Abilities; who, trading much to *Holland*, might be a credible Pretence as well for his Going, as Stay in the *Low Countries*. Mr. Turnour was in Disguise, (his Beard and Hair shaven quite off:) but Mr. *Baxton* appeared known and public.—They went first to *Amsterdam*, then to *Leyden*, not daring to enter *Haerlem* itself: For, the Town was very jealous, and had apprehended and imprisoned divers Persons who had come from other Parts for the same Purpose. They stayed till they had spent the whole Thousand Marks, in Gifts and Expences: So as the King was fain to send Five Hundred Marks more. Mr. Turnour had written to the King, that he had almost done his Work; a Bargain being struck betwixt him and two *Hollanders*, for bringing off one of the Under-Workmen, whose Name was *FREDERICK CORSELLS* (or rather *CORSELLIS*;) who, late one Night, stole from his Fellows, in Disguise, into a Vessel prepared for that Purpose, and got safe to *London*. It was not thought prudent, to set him on Work at *London*: But by the Archbishop's Means, (who had been Vice-Chancellor and afterwards Chancellor of the University of *Oxon*,) *Corsellis* was carried with a Guard to *Oxon*; which Guard constantly

"stantly watched this *Corsellis*, to prevent him from any
 "possible Escape, till he had made good his Promise in
 "teaching them how to print. So that at OXFORD Printing
 "was first set up in England: Which was before there was
 "any Printing-Pres or Printer in *France, Spain, Italy, or*
 "Germany except the City of *Mentz*, which claims the
 "Seniority as to Printing, even of *Harleim* itself; calling
 "her City *Urbem Moguntinam artis typographicæ inventricem*
 "primam: though it is known to be otherwise, that City
 "gaining that Art by the Brother of one of the Workmen
 "of *Harleim*, who had learnt it at Home of his Brother,
 "and after set up for himself at *Mentz*. This Press at Ox-
 "ford was afterwards found inconvenient to be the sole
 "Printing-Place of *England*; as being too far from *London*
 "and the Sea: Wherefore the King set up a Press at *St.*
Alban's, and another in the City of *Westminster*, where
 "they printed several Books of Divinity and Physic. For,
 "the King (for Reasons best known to himself and Council)
 "permitted then no Law-Books to be printed: nor did any
 "Printer exercise that Act, but only such as were the
 "King's sworn Servants; the King himself having the Price
 "and Emolument for printing Books."

UPON the Authority of this Record, all our later Writers have declared CORSELLIS to have been the *first* Printer in *England*. This is admitted by Dr. Middleton: And he specifies *Antony Wood* and Mr. *Mattaire*, and *Palmer*, and *Bagford*, by Name, as Persons who were clear in that Opinion. But he says, "it is strange that a Piece so fabulous and carrying such evident Marks of *Forgery*, could impose upon Men so knowing and inquisitive." He asserts, "that as it was never heard of before the Publication of *Atkyns's* Book, so it has never since been seen or produced by any Man." He cites *Palmer* himself as owning "that it is not to be found there now:" And he thinks it clear, that *Archbishop Parker* must have very carefully examined the Registers of *Canterbury*, and that it was not there in his Time. In fine, he declares in express Terms, "That we may pronounce this Record to be a FORGERY."

But though he seems to exult in having cleared his Hands of this Record, yet he admits, "that the Book itself stands firm as a Monument of the Exercise of Printing in Oxford

The first Work that is known to have a Date to it, was the PSALTER published at Mentz in 1457. "Six Years older than any Book of Caxton with Date. He acknowledges the Fact to be strong, and "what in ordinary Cases passes for certain Evidence of the Age of Books:" But he says, "that in this, there are such contrary Facts to balance it, and such Circumstances to turn the Scale, that he takes the Date in Question to have been falsified originally by the Printer, either by Design or Mistake, and an X to have been dropt or omitted in the Age of its Impression." And he argues with his usual

usual Sagacity and Acuteness, to shew not only the Possibility of his Conjecture, but the Probability of it, and (as he says) "to make it even certain."

Mr. Bowyer, whose general Learning and particular Knowledge in his Profession seem to qualify him for being at least as good a Judge of this Dispute as any Man that ever lived, does by no Means agree with Dr. Middleton in this Point of Caxton's Priority to the Oxford Book, or in the Arguments adduced by the Doctor in Support of his Opinion; any more than he does in the former Point, of the Place where the Art was first invented and practised Abroad.—He is of Opinion, that the Oxford pres was prior to Caxton's; and thinks that those who have called Mr. Caxton the "first Printer in England," and Le Land in particular, meant that he was the first who "practised the Art with *fixed* Types, " and consequently first brought it to *Perfection*?" Which is not inconsistent with Corsellis's having printed earlier at Oxford with *separate cut Type in Wood*, which was the only Method he had learnt at Harleim. The speaking of Mr. Caxton as the first Printer in England, in this Sense of the Expression, is not irreconcileable with the Story of Corsellis.

THESE Facts and Opinions being thus laid before the Reader, he will judge for himself, concerning their Truth or Probability. The Disputants on both Sides have agreed in one Position, which will be easily assented to; namely, "that it is very unsafe to trust to common History; and necessary to recur to original Testimonies, if we would know the State of Facts with Exactness."

Canniaq versus Davis.

Thursday
27th April
1769.

M R. Dunning (Solicitor-General) shewed Cause against a Rule which had been applied for by Mr. Ashurst, "to set aside the Proceedings for a Variance between the Declaration and the Process," The Process was "to answer the Plaintiff *qui tam pro Domini Rege quam pro se ipso sequitur.*" The Declaration was in his own Name, only; omitting the *qui tam* Part.

THE COURT held the Variance to be fatal:

PROCEEDINGS SET ASIDE.

Note—Master Benton thought, and the Court seemed to agree, that the *Converse* would have been otherwise; namely, that if the Process had been “to ‘answer the Plaintiff, singly,’ he might, in that Case, have declared tam pro se ipso, quam pro Domino Rego.

Brand and Wife *versus* Roberts and Wife.

THE COURT made absolute a Rule for a *Prohibition* to the Spiritual Court, to stay their Proceedings against the Defendants below, for calling a Woman “Whore,” in London; where, by the Custom, the Words are actionable. They said, this Matter had been long settled. (Lord Mansfield was not in Court).

Vide ante, 2032. Theyer v. Eastwick: Also see 1 Sir John Strange, p. 187. *Arggyle v. Hunt,* and p. 471. *Vicar v. Worth,* and p. 545. *Hodgkins et Ux. v. Corbet et Ux.* and p. 555. *Cook v. Wingfield.*

Friday 28th
April 1769,

Pryce, Bart. *versus* Foulkes and Others.

THIS was an Action of Trespass brought against several Defendants. There were two Writs of *Latitat*. Four of the Defendants were named in One of them; and Three, in the other: (For, there can’t be more than Four Defendants included in the same *Latitat*) The Plaintiff not declaring within the limited Time, the Seven Defendants signed Seven distinct Judgments of *Non-pros* against him.

The Plaintiff objected to this Proceeding, as being irregular: For that there ought to have been but One Judgment against him, for all the Defendants jointly; not a several Judgment for each Defendant.

THE COURT were of this Opinion; and accordingly set them aside, as irregular.

See 2 *Salk.* 435. Title “*Nonsuit*,” pl. 1. *Allington v. Vavasor:* Where a *Latitat* having been sued out against Four Defendants in Trespass, the Plaintiff was *Nonsuit* for Want of a Declaration; and the Defendant’s Attorney entered Four *Nonsuits* against him. It was holden to be irregular; because the Trespass is joint; and though the Plaintiff may count severally against the Defendants, yet it remains joint till it is severed by the Count.

Captain Parker *versus* Lord Clive.Wednesday
26th April

THIS was an Action brought by an Officer in the Military Service of the *East-India Company*, against the Defendant who was Commander in Chief of their Forces in India, for an Assault and false Imprisonment.

The Transaction arose in the *East Indies*, upon a Dispute about a Perquisite called *Batta*, which had been received by former Military Officers there; but was thought proper, by Lord *Clive*, to be discontinued in future, or at least considerably lessened. The Officers were exceedingly dissatisfied with this Reduction of their Pay or Perquisite, which had been allowed to their Predecessors; and resented it so highly, that about 175 of them threw up their Commissions and quitted the Service: Of which Number Captain *Parker* was One. Whereupon Lord *Clive*, as Commander in Chief, imprisoned him; and he was kept Four Months in Custody: But a Court Martial being called upon the Occasion, he was tried by it, and acquitted; as they apprehended him to have a Right to resign his Commission and quit the Service.

Lord *MANSFIELD*, before whom the Cause was tried, held that these Military Officers in the Service of the *East India Company* were not at Liberty to resign their Commissions and quit the Service, at any Time and under any Circumstances, merely *ad libitum*, whenever they themselves should think fit or be so inclined. If that were the Case, then indeed it would follow, that after Resigning their Commission, and thereby ceasing to be Objects of Military Jurisdiction, Lord *Clive* could no longer have any Power over them. This is the true Question, in the present Case: It turns singly upon the Plaintiff's having or not having this Option to resign; that is, "Whether such an Officer can quit the Service whenever he pleases, at any Time and under any Circumstances whatever." His Lordship thought he could not. But, in order to take the Opinion of the whole Court upon the Point of Law, he directed that the Plaintiff should be non-suited, but with Liberty to move the Court to set aside the Non-suit, without Payment of Costs.

Such Motion was accordingly made: And the Point was argued on Saturday the 22d and Monday the 24th of April 1769, by Mr. *Dunning*, then Solicitor-General and Mr. *Cox*, for the Plaintiff; and Mr. *Thurlow*, Mr. *Wallace*, and Mr. *Sayer*, for the Defendant.

On the Part of the Plaintiff, it was insisted that the Company's Contract with their Military Officers is *reciprocal*; and either Side is at Liberty to put an End to it whenever they please. The Rank and File Men engage, indeed, for a stipulated Term: But the Contract with their Officers does not mention or hint at any Time or Duration of their Service. It is a *general* Appointment; No binding Engagement is expressed, on either Side. The Company's Power to appoint Officer's is founded on a Charter of W. 3. * The Plaintiff had a Commission from the Company, in 1764, appointing him a Captain of Foot; and another like to it, given him by the Governor and Council of Bengal. There never was an Obligation upon any Man to continue a Soldier beyond the Time of his Contract. The Statute of 18 H. 6. c. 19. for punishing Deserters as Felons, is confined to their departing without Licence *within the Term* for which they were retained. Our annual Mutiny-Acts bind only during their Continuance. If they should expire, Soldiers would not be obliged to continue in the Service longer than they are contracted for: And it would be hard, if the *East India Company's* Officers should be bound to continue in their Service to the End of their Lives, when the Company lessen or take away from them the very Consideration that induced them to enter into it. As the Company can discharge them *ad libitum* and arbitrarily, they ought to have a reciprocal Election of quitting. Here were no Circumstances that could render the Resignation improper or dishonourable: The Pay was withdrawn, or at least the usual Emoluments. It was not a Resignation within the Limits of a Term contracted for. He had a Right to quit: He did quit. He was not a Soldier of the Company, not in their Pay, at the Time when he was treated as such. Therefore this Nonsuit ought to be set aside, and a new Trial had.

On the Part of the Defendant, it was urged. That the Subject-Matter of this Contract proves the Plaintiff's Claim to be absolutely inconsistent with the Nature of the Contract. It is absurd to imagine that the Officers should be all at Liberty to quit at the very Moment when their Service is most required; upon the very Point of an Engagement, the Instant of an Attack, or *flagrante bello*. The Company have full Power of making War and Peace: And therefore it must be meant and intended that they should have the same Power over their Officers and Soldiers in *India*, as the King himself has here at Home, or any other acknowledged Sovereign. If a Man, since the Statute of 18 H. 6. lists indefinitely "to serve the King in his Wars," he is bound till discharged. If a Soldier is hired by the *East India Company* in general Terms, "to serve them in their Wars," he must at least be bound till the War is at an End: He can't quit *flagrante bello*. Indeed, if they choose to hire for a limited Time, the Person

* And vide
27 G. 2.
c. 9.

sions so specifically engaging for a limited Time *only* will not be obliged to serve beyond it. Though our Mutiny-Acts *annually renewed* are confined within the Limits of a Year, that is not the Case of the Statute which impowers the India Company to raise Soldiers : * For, that Act is *perpetual*; and *27 G. 2. the Officer or Soldier hired under it, by the Company, is liable to Martial Law in *India*, till he is discharged. Their Army is a Standing Army: And therefore it was necessary that their Mutiny-Act should be perpetual. It can never be conceived that their Officers should have it in their Power to quit the Service at the very critical Moment when their Assistance is most wanted, and those Duties required of them which were the only Reason of their being taken into it. The Company are at great Expence upon these Gentlemen, before they can receive any Benefit from their Service: And it would be strange if they might quit their Service, the first Day or Hour that they should become capable of actually entering upon it. The Company might be ruined, if this Doctrine would hold.

IN REPLY, Mr. Dunning acknowledged that there appeared to be Inconveniences on both Sides: But it was in the Power of the Company to avoid them, by varying the Terms of their Contract, and engaging the Officers to serve them for a limited Time. If the present Contract, which is indefinite, be not determinable at Will, it must be a Contract for *Life* if the Company refuse to dissolve it. The Officers ought to have an Option to dissolve it, as well as the Company: It is just, that it should be reciprocal. An Officer's having received a general Commission from the Company, without engaging for any limited Term, can not subject him to the Indian Mutiny-Bill and to Martial-Law in *India*, during his whole Life. The Act of 2. G. 2. c. is expressly confined to the Time contracted for: The Words are “*within such Time as such Officer or Soldier shall have contracted and agreed to serve the said United Company.*”

THE COURT took Two or Three Days to consider:

And on Wednesday 26th April 1769,

LORD MANSFIELD declared their Opinion, in these Words—UPON the general abstract Question, WE are ALL of Opinion “that a Military Officer in the Service of the East India Company has not a Right to resign his Commission, at all Times and under any Circumstances whatsoever, whenever he pleases.”

Where-

Whereupon, Mr. DUNNING prayed a new Trial, in Order to have an Opportunity of shewing the particular Circumstances under which Captain Parker stood, when he resigned his Commission. For, it was agreed that no Evidence of these particular Circumstances was entered into at the Trial : But the Matter was taken up *in limine*, and the Point reserved upon the general Question. Therefore, as there may be Circumstances under which such Officer may have a Right to resign; though under other Circumstances, he may not have a Right to do so; it was reasonable that he should have an Opportunity of shewing the true Circumstances which induced this Resignation.

THE COURT judged this to be reasonable: and accordingly granted the Plaintiff a new Trial, without Payment of Costs.

A new Trial was afterwards had: Which went *against* Captain Parker.

See further on, in page 2472, under Tuesday 21st November 1769, a like Case between Lieutenant *Vertue* and Lord *Clive*; which turned upon the particular Circumstances; and in which Mr. *Vertue* was likewise unsuccessful.

Saturday
6th May
1769.

Hargrave *versus* Le Breton, One &c.

THIS ACTION was called by the Council for the Defendant, an Action of *Slander of the Plaintiff's Title*: But the Plaintiff's Counsel said it was an Action upon the Case, for a *real Injury* sustained by him.

It had been tried before Lord *Mansfield* at *Guildhall*; and a Verdict given for the Plaintiff, with 50*l.* Damages: But the Defendant had moved to set it aside, and to have a new Trial. It was argued upon Tuesday 25th April 1769; and again, upon Saturday the 29th: And this Day, Lord *Mansfield* delivered the Opinion of the Court.

The general Substance of the Case was, That the Premises, (which were of the Value of about 1200*l.* and originally belonged to one *John Loveday*, but had been mortgaged by him to the Plaintiff *Hargrave*, who had also got in a prior Assignment of them,) were upon *Sale by AUCTION*, for the Benefit of the Parties respectively interested, and by their joint Agreement. The Auction was actually begun; and some Persons

Persons had bid: But at the first Beginning of the Bidding, any before it had proceeded to any considerable Degree of Advancement, the Defendant Mr. Le Breton, who was concerned as Attorney for one Mr. Lee, a Creditor of *John Loveday* the Original Owner and Mortgagor, came into the Room in a great Hurry; and said to the Company "that he had "bad News to tell them." Being asked "What News?" He answered, that he was sent by a Creditor of Mr. *John Loveday's*, to acquaint them "that the said *John Loveday* "was a *Bankrupt* before he made the Mortgage to the Plaintiff; and that there was a *Docket* made out, for a Commission against him; and that his Name would be in the *Gazette* on the Saturday Evening following." Whereupon, the *Bidding immediately ceased*; and the Estate remained *unsold*, and does still remain so. What the Defendant thus declared, was partly true, and partly otherwise. It was true, "that he was *really sent* by his Client Mr. *Lee*, who was a "Creditor of *Loveday*, on Purpose to make this public Declaration at the Auction, of *Loveday's* being a *Bankrupt* "before he made the Mortgage to the Plaintiff; and that "Mr. *Lee* intended to take out a Commission against him." But it was not true in Fact, nor did Mr. *Lee*, his Client, give him any Authority to say, that there was a *Docket made out* "for a Commission against him," nor "that his Name would be in the *Gazette* on the Saturday Evening following:" Neither is there *at* any *Docket* or *Commission*, nor has his Name yet been in the *Gazette*. However, *no actual Malice* was either alledged or proved. But the Counsel for the Plaintiff inferred *Malice*, from his false Assertion, which was merely his own, *without any authority* from his Client; and which (they said) he could not but know to be *false*, as he was himself Mr. *Lee's* Attorney, and the Person to be employed in suing out the Commission of *Bankruptcy*, if it had been sued out at all. It appeared, upon the Evidence, that One *Bolland* had recommended *Le Breton* to *Lee* (*Loveday's* Creditor) to take out a Commission of *Bankruptcy* against *Loveday*, who in Fact was then become *Bankrupt*; and that *Lee* did send *Le Breton* to this Auction, to declare, "that he "would petition, and make him a *Bankrupt* that Night." *Le Breton* was not at all known to any of the Parties: Nor had he any Knowledge of these Affairs, other than the Information he received from his Client *Lee*. The Fact of *Loveday's* having committed an *Act of Bankruptcy* before he made the Mortgage to *Hargrave* was fully proved by *Bolland*: And it appeared that *Lee* had Notice of it from *Bolland*.

THE COUNSEL for the Defendant offered an Objection which did not go to the Merits; and was easily answered. They said, the Action was founded on special Damages: And therefore the Names of those Persons who would otherwise have

have been Purchasers, but went off from it upon the speaking of these Words, ought to have been *specified*; whereas this Declaration only charges it thus—“Whereby divers *Persons* who would have purchased &c,” without naming any One who went off from treating about the Purchase.

The Answer was, That in the Nature of this Transaction it was *impossible* to specify Names. The Injury complained of is, that the Bidding was thereby prevented and stopt. No One can tell *who* would have bid, and who would not. The Auction ceased: And every Body went away. It could not be known who would have been Bidders, or Purchasers, if it had not been thus put an End to.

THE MAIN QUESTION was—Whether the Defendant was justifiable in having spoken these Words upon this Occasion, as a Messenger from and Agent for the Creditor of *Loveday*; not having confined himself to the Message he was authorised by his Client to deliver, and the Declaration he was sent to make on his Client’s Behalf; but having added to it, of his own Head, other Assertions which were not true in Fact, nor given him in Charge by his Client. For, supposing him to be excuseable in executing his Commission, as Mr. Lee’s Attorney or Agent, yet he had exceeded the Bounds of it, as well as the strict Truth: Which was urged by the Plaintiff’s Counsel, to imply Malice in the Defendant himself personally.

THE COURT seemed, upon the Two first mentioned Days, to have no Doubt but that Mr. *Le Breton*, who acted as Agent for the Creditor, would have been excuseable, if he had only delivered his Client’s Message; and that if the Creditor had been himself present and had *spoken* the Words of his own Message, he would not have been liable to an Action for giving a Notice necessary to be given, in order to prevent a Purchaser’s Title from being good against him for Want of Notice; and that Malice should not be implied, where the Words spoken are true, and the Speaker claims Title. But whether Mr. *Le Breton* was excuseable for what he voluntarily added, beyond the Limits of his Commission, they took a few Days to consider.

Lord MANSFIELD now declared the Result of their Consideration.

THE QUESTION is, “Whether, upon the Evidence, the Plaintiff ought to recover against the Defendant, upon the Circumstances of this Case.”

It is to be considered, in Point of Law, 1st. "Whether this Action would have lain against *Le Breton*, the Attorney for the Creditor, if he had only delivered the Message in his Client's own Words : And 2dly, "Whether the Variation he made from them will subject him to this Action."

As to the first—We are ALL clear "that is would *not*." He is no more liable to the Action, than the Creditor himself would have been. He was sent by *Lee*, to make this Declaration: And *qui faciet per Alium, facit per Se*. But the Plaintiff could not have recovered against *Lee*: For, to maintain such an Action as this is, there must be MALICE; either express or implied; and the Words spoken must go to defeat the Plaintiff's Title. Whereas, here is *no Malice*, either express or implied. The Words of the Message sent by *Lee* are *true*: And they proceed from a Person called upon to give Notice; either to protect his own Property, or (what is his Duty as a moral Act,) to save another from being cheated. *Lee* had Notice of *Loveday's* Bankruptcy, from *Bolland*. *Lee* had an Interest in the Fund: And he was intitled to take out a Commission against *Loveday*. He reads an Advertisement "for the Sale of *Loveday's* Estate." He was thereby *called upon*, in order to preserve his own Interest and that of the Rest of the Creditors, as an honest and a prudent Man, to *give this Notice*. For, if the Estate had been purchased without Notice of the Bankruptcy, such Purchaser would have been protected by a satisfied Term prior to the Act of Bankruptcy still standing out. When an Auction was advertised and was proceeding for the Sale of this Estate, with Intent to cheat Purchasers by a false Title, shall not he, as an honest Man, give this Notice, and prevent Iniquity?

But here, this Man (*Lee*) had a Property of his own, to secure: He was a Creditor of *Loveday*, and intended to sue out a Commission.

We are clear, that under such Circumstances, *Malice* cannot be implied.

No Action lies for giving the *true* Character of a Servant, upon Application made to his former Master, to inquire into his Character, with a View of hiring him: Unless there should be extraordinary Circumstances of express Malice.

Another Ground to maintain such an Action as this, is "that it must be *such* a Slander as goes directly to defeat the Plaintiff's Title." But in this Case, the Assertion does not go to defeat the Plaintiff's Title. [Which his Lordship shewed

shewed by an Induction of Particulars, not at all necessary to be here specified, as they relate only to this single Case.]

As to the SECOND QUESTION—"Whether *Le Breton's* varying from the Message he was charged with, and adding more than he was commissioned to declare, or even authorized to say in Point of strict Truth."—It appeared, that his Client had told him "that he would take out a Commission that Night." And if he had done what he told *Le Breton* "that he would do," *Loveday's* Name would have been in the *Gazette* on the Saturday Evening following. So that there was no material Variation from what he was commissioned by his Client *Lee* to say. Nor did it make any Difference with regard to the Plaintiff or his Title: For, *Loveday* was then become Bankrupt and liable to a Commission; which Commission might have been taken out upon that Day, and the Bankrupt's Name inserted in the *Gazette* of the Saturday Evening following.

We are therefore ALL of Opinion, that there is no Foundation for this Verdict; and that it ought to be set aside upon Payment of Costs.

RULE made ABSOLUTE, for setting aside the Verdict, and having a new Trial, upon Payment of Costs.

Monday
8th May
1769.

Hall *versus* Harding and Others.

THIS was an Action in *Replevin*, for distraining Fifty-One of the Plaintiff's Sheep, upon a Waste or Pasture called *Whitmanlie Down* in the Parish of *Odiham* in *Hampshire*.

The Defendants avow the Distress; because the Defendant *Harding* was intitled to a Right of Common, in respect of Ten Acres of Land in his Possession, for Two Sheep for every Acre of those Ten; and because the Sheep were doing Damage to that Right, the Defendants distrained them.

The Plaintiff pleaded (by Leave) Four Pleas in Bar; alledging different Rights of Common to himself: Upon Three of which Pleas there are Issues joined. In the Foueth of them, the Plaintiff derives a Right of Common to himself as Tenant of Eight Acres of Land in that Parish, with the like Limitation, that is, for Two Sheep for every Acre: And being possessed of those Eight Acres, he put Sixteen Sheep into the Common; and in that Right they continued therein, till the Defendants wrongfully distrained them.

To

To this Plea in Bar of the Avowry. the Defendant (the Avowants) after admitting the Plaintiff's Right of Common as pleaded by him, reply that at the Time of the Distress, the Plaintiff had Sixteen Sheep upon the Common, *over above and besides* the Sixteen which the Defendants distrained: And that the Defendants left the first mentioned Sixteen to use the Commons; and only distrained the *supernumerary* Sixteen with which the Plaintiff had *overcharged* it of his own Wrong, and which were doing Damage to *Harding* in Manner and Form as alledged in the Avowry: (Which Allegation in the Avowry concluded—" So that *Harding* could not enjoy his Common in so large and ample a Manner as he ought.")

To this Replication the Plaintiff demurred.

This Demurrer was argued on Friday 28th April 1769, by Serjeant *Burland* for the Plaintiff, and Serjeant *Davy* for the Defendants.

THE QUESTION was " Whether One Commoner can dis-
" TRAIN another Commoner's Cattle with which he has over-
" charged the Common beyond his fintaed Number."

Serjeant *Burland* argued that he could not. He has a Right to distrain the Cattle of a STRANGER. Damage-seasant: But he has not a Right to distrain the Cattle of another Commoner surcharging.

Bracton, lib. 4. p. 229. 22 *Affiz.* pl. 65. *F. N. B.* 125. *Godbold* 122. *Coney's Case*. *Fitz. H. Abridgment*, Title "Ad-
" measurement :" pl. 6. the Note : (S. C. with 22 *Affiz.* pl.
65.) *Yelv.* 104. *Hoddesdon, Miles v. Gresil* (*Vide Cro. Jac.*
195. S. C.) 9 *Co. 112. Robert Mary's Case*. Style 428, *Bronze*
and *More*. 1 *Lutw.* 107. *Hassard v. Cantrell*. 2 *Lutw.* 1238.
Dixon v. James. *Freeman's Reports* 273. S. C. 2 *Lord Raym.*
1186. *Follet v. Troake et al.*

Serjeant *Davy*, premising " that a Commoner may un-
" doubtedly distrain the Cattle of a STRANGER Damage-
" seasant," argued that a fintaed Commoner who surcharges is
a Stranger, as to the surplus Number: And a Distress lies a-
gainst him for the surplus Cattle.

46 *Ed. 3. 12. b. pl. 13. 1 Ro. Abr.* 665. Title, " *Distress* ;"
Letter C. pl. 3. S. C. Serjeant *Gould's Note of Dixon v.*
James: (Which says " that the Court took Time to confi-
" der.") *Yelv.* 129. *Kinrick v. Pargiter*. 1 *Ro. Abr.* 405.
Title " *Commoner* ;" pl. 6. between *Trulock* and *White*.

Freeman

*Freeman 273. Dixon v. James. Hort v. Curtis et al. in C. B.
Mich. 32 G. 2. Rotlo' 630, 631, 632.*

Serjeant *Burland*, in his Reply, observed, that the Case of *Kinrick v. Pargiter*, in *Yelv.* 129. is likewise reported in *Cro. Jac.* 228. and *Ney* 130. and all different: But it was of no Authority, he said, against him.

Lord *MANSFIELD*—It is proper, in such a Case as this, to give the Opinion of the Court with * *Precision*. Therefore let it stand over, for our Opinion.

His *LORDSHIP* now declared their Opinion; and after having shortly stated the Pleadings, proceeded to the following Effect—

Upon this Demurrer, The Point insisted on, for the Plaintiff, was—That the Defendant *Harding* having no greater Interest in the Plea in which, &c. than a mere Right of Common, he could not lawfully *distrain* the Cattle of another Commoner, for any *Surcharge* whatsoever; but that his proper Remedy must be either by a Writ of *Admeasurement* of Common, or by the usual *Action* on the *Case*.

On the other hand, it was contended, for the Defendants, That this being a *stinted* Right of Common, the Defendants might lawfully distrain the Overplus.

To deduce this Conclusion, it was, in the first Place, alledged as a general and established Proposition, “ That a Commoner may undoubtedly distrain the Cattle of a STRANGER :” And then it was argued, that in all *stinted* Rights of Common, the *supernumerary* Cattle have no Colour of Right to depasture upon the Common; and therefore may properly be considered as the Cattle of a mere Stranger; and, as such, may be distrained by any of the Commoners.

For this Purpose, an Authority was cited from the Year-Book of the 46th of *Edw.* 3. fo. 12. where, in Replevin, the Defendant pleaded first, “ that the Taking was in another Place, and in order to have a Return, alledged “ that the Plaintiff had Common for so many Beasts only; and that “ he put in more than he ought; and therefore the Defendant “ took the Overplus Damage-seasant.”

* The very great Accuracy and Copiousness with which this Intention was afterwards executed, is the only Reason why I have not (in so curious a Case) given the Arguments of the Counsel, and the Cases cited by them, more at large.

But

But from that Case no clear Conclusion can be drawn; because, as *Lutwyche* observes, in the Case of *Dixon v. James*,^{*} * 2 Lutw.
that *Avowry* was for Damage-feasant generally, (that is,¹²⁴¹
without saying "for a Damage to the Plaintiff's Right of
" Common;" and therefore it is more probable that it was the
Owner of the Soil, who made that Avowry; for, a Com-
moner must avow more specially.

Another Case was cited from *Yelverton* 129. (the Case of *Kinrick v. Pargiter*,) where the Defendant distrained the Cattle of the Lord; suggesting a Custom "for the Lord to en-
joy the Place in which &c, solely to himself till Lammas-
day, but after that Day it should be common for the Ten-
ants, and the Lord should put in only Three Horses." And because the Lord had put in more than Three Horses, the Defendant (a Commoner) distrained the Overplus, as Damage-feasant. They were at Issue, upon the Custom: And the Issue was found for the Custom, against the Lord. *Yelverton* moved in Arrest of Judgment, "That the Defendant, being only a Commoner, could not distrain the Cattle of the Lord, in the Lord's own Soil." But, according to that Report, *Fenner*, *Williams*, and *Crook* held the Distress to be good; because by that Custom the Lord was excluded except for his Stint, and all the Vesture and Benefit of the Soil belonged to the Commoners: and that they had no other Remedy to preserve their Interest in sending their Cattle there, in case of the Lord's offending against the Custom; and that the Custom made the Lord, in that respect, as mere a Stranger as any other Person; and clearly a Commoner might distrain the Cattle of a Stranger Damage-feasant. But the Chief Justice and † *Yelverton* doubted; and † Sir Christopher Yelverton, (I imagine.)
The Re-

This Case is also reported in *Cro. Jac.* 208. But in 2 *Ro. porter* was
Abr. 267 §. where the same Case is mentioned, it is said to Sir Henry,
be determined "that this Prescription was bad; for that the Title
" Lord can not be so stinted."

What the real and ultimate Determination of that Case
was, does not certainly appear: And therefore no decisive
Conclusion can be drawn from it.

The chief Argument to maintain it, was by considering the Commoners as possessed of the whole Vesture of the Land, after Lammas-day; subject only to the Lord's Privilege of putting Three Horses there; that is, by turning the Tables upon the Lord, and considering him in the Light of a Commoner, and Themselves as possessed of the Soil and Vesture during the Time prescribed for.

But

But as the Lord had the Land entirely entirely to him at all other Times of the Year, and even in the Commoning Seasoning was not *totally* excluded, the Commoners could hardly have a Right to distrain any Cattle of the Lord's, when he was clearly intitled to put *some* Cattle there, and (though he exceeded his Number) had a Colour of Right.

In the Case of *Trulock v. White*, 1 Ro. Abr. 405, 406. where the Lord's Cattle were distrained by a Commoner, the Land was by the Custom to be *entirely fresh*, every Second Year, till *Lady-day*: And therefore, during the Season, the Lord was *totally excluded* and had *no Colour* for putting any Cattle there at all.

*Vide Danvers's Abr. vol. 1. pl. 6. in Margin; and the Cases referred to.

But where there is *no such Exclusion*, it is an established Rule, "that a Commoner *can't distrain* the Cattle of the Lord, for overcharging the Common."

In the Case of *Hoddesdon v. Grefil*, Telv. 104. it was agreed by all the Judges, "that if the Lord surcharges the Common, the Commoners *can not drive* the Lord's Beasts out: " But they may distrain the Cattle of a Stranger, or may "drive them out of the Common." And the Reason there given is this—"For, a Stranger has not any Colour to have "his Beasts there."

But if there be *no Custom to exclude the Lord totally* during the Commoning Season, his Property in the Soil would at least give him a Colour for putting his Cattle there: And though he over-charged the Common, no Cattle of the Lord's can be deemed *Trespassers*, or the Lord a Stranger in his own Soil. The Commoners therefore could have no Authority in themselves to take an immediate and summary Execution against the Cattle of the Lord, by distraining them Damage-feasant, as they may the Cattle of a Stranger who has no Pretence or Colour of Right.

From these Cases, therefore, which were cited for the Defendants, no Argument can be drawn to the present Point.

The Case of *Dixon v. James*, (which is in 2 Lutw. 1238. and Freeman 273.) was mentioned on both Sides. The Right of Common, in that Case, was for all Cattle *levant and couchant* upon the Estate: And the Question was "Whether one Commoner can distrain the Cattle of another Commoner, for overcharging." There was a Rule to shew Cause why the Judgment should not be arrested: upon the Objection "that the Commoner could not distrain a Fellow Commoner's Cattle." But Freeman's Report of that Case was cited for the Defendants; because it is there said to be agreed

agreed " that where a Commoner was intitled to Common
" for a *certain Number* of Cattle (as for Ten, or any other
" *certain Number*,) there if he furcharged, another Com-
" moner might *distrain*."

It is unnecessary to give any Opinion as to the Commoner's Right of distraining where the Number is *absolutely certain*; that is, where the other Commoner's Claim is for Ten, Twenty, or Thirty, *without any Relation to the Quantity of Land*. For, in the present Case the Prescription is for " *Two Sheep for EVERY ACRE of Land* :" And therefore the whole Number is *not absolutely certain in it self*, but depends upon the *Number of Acres* which the Commoner is possessed of. And there is this essential Distinction between the two Cases—that in the former, the Overcharge is *clear and self evident*; (for, it requires no Judgment or Proof, to decide whether Twenty are more than Ten;) and in such a Right of Common, there would be no *Colour of Right* for the overplus Number: But in the latter Case, where the Number of Cattle to be pastured *depends on the Number of Acres* which the Commoner is possessed of, it requires a *Medium* to determine the proper Proportion or Number of Cattle, that is, an *Admeasurement* of the Commoner's Land. And when the Question depends upon a *collateral Fact*, or upon a Matter of *Judgment*, the Party interested can never be a competent Judge in his own Cause.

The ancient Remedies for a Commoner, when the Common was overcharged, were these Two*. If the Surcharge was by the *Lord*, the Remedy by *Affise*: If by another Commoner, the Relief was by a Writ of *Admeasurement*. But in ^{*Bracton, lib. 4. p. 222 F.N.B.} Robert Mary's Case, (9 Co. 112.) it was determined, " that ^{125.} an Action on the Case would lie." And that Action may be maintained, either against the *Lord*, or against a *Fellow-Commoner*. But in *all* those Remedies, as the *Lord*, or the other Commoners, have a *Colour of Right*, the Question " Whether he has exceeded that Right" must be determined by an indifferent and competent Jurisdiction, and not by the Commoner himself. The Commoner therefore could not lawfully *distrain*: For, that would be making himself his own Judge, in a Matter that was uncertain in itself; and taking an immediate Execution, upon his own Judgment. The *Levancy and Couchancy*, where *that* is the Measure of the Commoner's Right, must be tried and determined by a *Jury*. And in the present Case, where the Number of Cattle to be put on depends upon the Number of the Commoner's *Acres*, the same Jurisdiction must decide between them. " What Number of Acres the Commoner is really possessed of." It is, in Effect, the *same Object of Inquiry*, as *Levancy and Couchancy*: And it is now established " that where the Right of Common is for Cattle *levant and couchant*, one Commoner can not *distrain* the Cattle of another, for a supposed Overcharge." UPON

UPON THE WHOLE, the Right of *distraing* seems to turn upon this—That wherever there is a COLOUR of Right for putting in the Cattle, a Commoner *can not distraing*: because it would be judging for himself, in a Question that depends upon a more competent Inquiry: But where Cattle are put upon the Common, without any Colour or Pretence of Right, the Commoner *may distraing* them; and therefore he *may distraing* the Cattle of a Stranger. But here, the Plaintiff had a COLOUR for putting in his Cattle; though, in Fact, he might exceed the due Number. He might put them in under the Idea or Pretence of having *more Acres* of Land, than he *really* had. And though, in the Pleadings, he has stated his Number of Acres to be only Eight; yet the Question, as to the Right of *distraing*, depends on the Nature of the Common, and not on the particular Facts, In Cases where a Writ of *Measurement* lies between Commoners, One *can not distraing* the Other: He can not for his own Benefit, ad-measure the Right of the Other. Therefore we are all of Opinion that this Distress was illegal and bad: And the Plaintiff must have Judgment.

JUDGMENT for the PLAINTIFF.

Bidmead *versus* Gale, the Younger.

L ORD MANSFIELD on the same Day (the last Day of the Term) delivered the Resolution of the Court in this Case also.

It was an Action of Covenant brought upon Articles to run a *Horse Match*. The Agreement was, that Each should start his Mare; and that if either should refuse or neglect, he should forfeit and pay 25*l.* to the Owner. So that it was a Match for 25*l.* each Side; Play, or pay: But the Plaintiff was to pay the Defendant Five Pounds beforehand, as a Consideration to induce him to make the Match. The Defendant afterwards refused to run the Match. Whereupon the Plaintiff brought this Action against him, for the 25*l.* and assigned the Breach of Covenant, in the Defendant's not starting his Mare. The Cause was tried before Baron Perrott, who considered it as a Match for 50*l.* and directed a Verdict to be found for the Plaintiff, with Liberty to move in Arrest of Judgment.

A Motion in Arrest of Judgment was accordingly made, on Friday 5th May 1769, by Mr. Hall and Mr. Price, and defended by Mr. Ashurst and Mr. Selwyn.

After

After some little Litigations “Whether Horse-racing was “a Game, within 16 C. 2. c. 7. or 9 Ann. c. 14,” and “Whether this Deed was a Security made void by 9 Ann. c. 14.” and a Discussion of a Case in 2 Lord Raym. 1366. *Burgess v. Bracher*, where no such Exception was taken; and of another Case in 2 Strange 1159. *Goodburn v. Marley*, where Horse-Races are holden to be within the Acts against Gaming; it was reduced to this single Question—“Whether this was a Match for Fifty Pounds; or for less than Fifty Pounds.” If it was for less than 50*l.* it is prohibited by 13 G. 2. c. 19. *scet. 5.* which enacts “that no Person shall start or run any Match with or between any Horse, Mare or Gelding, for any Sum of Money, Plate, Prize, or other Thing whatsoever; unless such Match shall be started or run at Newmarket or Black Hambleton, or the said Sum of Money, Plate, Prize, or other Thing be of the Real and intrinsic Value of FIFTY Pounds, or upwards.”

The Defendant’s Counsel endeavoured to shew, that this was only a Match for 25*l.* as neither Party could lose more than that Sum; or, at the utmost, a Match for 45*l.* as the Total of both Sums *risked* amounted to no more; for, there was no *Risque* remaining upon the Five Pounds which the Defendant had received from the Plaintiff, and had safe in his Pocket, without Possibility of losing it upon this Match.

The Plaintiff’s Counsel argued, that the Sum run for was most manifestly Fifty Pounds; and that the advancing Five Pounds certain made no Sort of Difference: The Plaintiff only gave the Defendant 5*l.* to run a Match with him for fifty.

THE COURT, as it turned upon the Construction of a general Act of Parliament, took a few Days to consider.

And now LORD MANSFIELD declared, that they were ALL of Opinion “that this was not a Match for less than Fifty Pounds:” And therefore the Judgment ought not to be arrested.

THE RULE to shew Cause why the Judgment should not be arrested, was discharged: And the *Postra* was ordered to be delivered to the Plaintiff.

☞ This was clearly a Match for 53*l.* though the Stakes were unequal.

*Bidmead contributed 25*l.* + 5*l.* = 30*l.**
*Gale contributed 24*l.* - 5*l.* = 20*l.**

50*l.* the Stake to be run for.

As *Bidmead* contributed 30l. and *Gale* only 20l. (that is, Three to Two) it may be supposed that *Bidmead's* was the better Mare, in the Proportion of Three to Two; and that his Chance of winning was in the same Proportion of Three to Two. And if they had agreed to divide the Stake of 50l. without running the Match at all, *Bidmead* ought to take up 30l. of it; and *Gale*, only 20l.

If it had been an *equal* Chance “*Whose* Mare should win;” *Bidmead* would, in such Case, have been very imprudent in betting three to two: Because, the Chance of winning being (*ex hypothesi*) *equal*, the true Value of such equal Chance would be 25l. a Piece; whether they should run the Match, or agree to divide the 50l.

In either Case, the Stake was 50l. whether it should be run for, or divided without running. If run for, it would have been a Match for Fifty Pounds.

And I imagine, that the Law of *Westminster-Hall* does here happily coincide with the Laws of the Turf.

The End of Easter Term 1769, 8 G. 3.

Trinity Term

9 Geo. 3. B. R. 1769.

Rex *versus* Inhabitants of St. Bartholomew's the ^{Friday 26th}
Leſs. ^{May 1769.}

THIS was a Rule to shew Cause why the following Order
of Sessions, (made at the General Quarter Sessions,
holden for the City of London, at Guildhall, on the 10th
of January 1769,) for quashing a Rate made for the Relief
of the Poor of the Parish of St. Bartholomew the Less, Lon-
don, should not be quashed for the Insufficiency thereof.

WHEREAS the General Sessions of the Peace &c. holden
for the City of London, at the Guildhall within the said City,
on Monday the 16th Day of May in the Eighth Year of the
Reign of our Sovereign Lord George the Third &c. the Mayor
Commonalty and Citizens of the City of London, Governors
of the House of the Poor commonly called St. Bartholomew's
Hospital near West Smithfield, London, of the Foundation of
King Henry the Eighth, did exhibit their Petition and Appeal,
setting forth, "that St. Bartholomew's Hospital, situate in
"the Parish of St. Bartholomew the Less, is of ancient and
"royal Foundation, granted and established by King Henry
"the Eighth, for the Relief of sick lame wounded and dis-
"eased POOR, wherein some Thousands of poor Objects are
"annually relieved and cured; and that soon after the great
"Fire of London, Houses and Shops were made in the said
"Buildings, within the Cloisters and Precincts of the Hospital,
"for the Convenience of the Inhabitants of London (then in
"great Distress for Houses,) who, occupying the same as
"Tenants to the Hospital, for their own Benefit, became
"rateable and chargeable to the Poor-Rates; and that about
"the Year 1730, some of the ancient Buildings and Wards
"of the Hospital, and some of the said Houses and Shops,
"having become ruinous, were pulled down; and since
"which, by the Donation of Governors and other Benefac-
"tors, Four large Piles of Buildings have been progressively

" erected, and are now USED for the Hospital; One of which
 " Pyles or Wings contains a Hall, Compting-House, and other
 " Rooms, which are used for Meetings of the Governors, re-
 " ceiving Rents, Examining and Admission of Patients; and
 " the other Three Pyles of Buildings are used for Wards for
 " the Patients and their Nurses only; and that One of the
 " said Pyles or Buildings of the Hospital being finished about
 " the Year 1758, the Churchwardens and Overseers of the
 " Poor and Inhabitants of the Parish of St. Bartholomew the
 " Less, by a Rate, intitled a Rate or Assessment on the IN-
 " HABITANTS and OCCUPIERS of Lands, Houses, Shops,
 " Sheds, Tenements, and Warehouses, within the Parish of
 " St. Bartholomew the Less, London, made and assessed by
 " them the Churchwardens and Overseers of the Poor and
 " Inhabitants of the said Parish, whose Names are thereunto
 " subscribed, pursuant to the several Acts of Parliament
 " made in that behalf, for Three Months, for or towards
 " the Relief of the Poor of the said Parish, as their Neces-
 " sity shall require, have assessed and rated the Petitioners,
 " for such Wards of the said Hospital, at and after the
 " Rate of Twenty Pounds a Year, for and towards the Re-
 " lief of the Poor of the said Parish, as followeth, that is
 " to say, The Mayor Commonalty and Citizens of the City of
 " London, Governors of the House of the Poor, commonly
 " called St. Bartholomew's Hospital near West Smithfield
 " London, of the Foundation of King Henry the Eighth, for
 " Lands on which STOOD Tenements and Houses BY THEM
 " PULLED DOWN AND DEMOLISHED; the Tenants where-
 " of were used to be charged in the Poor's Rate, 5l. quar-
 " terly; and that the Parish have continued such Rate upon
 " such Wards for the Poor, ever since; to the Detriment
 " and Loss of the Charity; AND that about the Year —
 " an Elaboratory also hath been erected for the Service of
 " the Hospital only, upon Ground within the Liberty and
 " Precinct thereof; which the said Churchwardens, Over-
 " seers and Inhabitants have assessed after the Rate of 2l.
 " 18s. 6d. a Year, as followeth, that is to say, The Mayor
 " and Commonalty and Citizens of the City of London, Go-
 " vernors of the House of the Poor, commonly called St. Bar-
 " tholomew's Hospital, near West Smithfield London, of the
 " Foundation of King Henry the Eighth, for their Elabo-
 " ratory, where several Houses stood, which were used to be
 " charged in the Poor's Rate, 12s. quarterly; which late
 " hath been continued, and now continues to be rated, to
 " the Detriment and Loss of the Charity; AND that all the
 " said Four Pyles of Buildings being finished in 1766, the
 " Governors pulled down Nineteen old Houses and Shops,
 " (Part of the said ancient Buildings,) to make an Area to
 " the Hospital, for the Benefit of the Patients; which is a
 " void unoccupied Space of Ground, of about 66 Yards by
 " 60; for which, the said Parish Officers have assessed and
 " rated

“ rated the said Governors after the Rate of 41*l.* 5*s.* a Year,
“ as followeth, that is to say, The Mayor Commonalty and
“ Citizens of the City of London, Governors of the House
“ of the Poor, commonly called St. Bartholomew’s Hospital
“ near West-Smithfield, London, of the Foundation of King
“ Henry the Eighth, for Lands on which stood Tenements
“ and Houses (within the Quadrangle of the said Hospital,
“ besides such as were before by them pulled down and
“ demolished,) by them pulled down and demolished, the
“ Tenements whereof were used to be charged in the Poor’s
“ Rate 10*l.* 6*s.* 3*d.* quarterly: and which said Sums of
“ 20*l.* 2*l.* 8*s.* and 41*l.* 5*s.* making, in all, 63*l.* 13*s.* a
“ Year (over and above what is charged upon their re-
“ spective Officers residing in the said Hospital,) was for
“ the Year 1767, and now continues to be assessed and rat-
“ ed on the said Governors, in respect of the Premisses;
“ AND that the Petitioners were advised and humbly insist-
“ ed, that the Petitioners Servants or poor Patients, Inha-
“ bitants or Occupiers of the said Premisses, are not liable,
“ nor ought to be charged *any Thing*, to the Poor’s Rate, in
“ respect of the said Hospital-Elaboratory, or void Space of
“ Ground: And therefore the Petitioners humbly appealed
“ from such Rate and Assessment, in regard to the above-
“ mentioned Sums of Money.” AND WHEREAS the final
Hearing and Determination of the Matter of the said Ap-
peal stands duly adjourned unto the present Sessions by divers
Orders; Now, upon hearing what is alledged, as well on
behalf of the said Mayor and Commonalty and Citizens Go-
vernors as aforesaid, as on behalf of the Churchwarden’s and
Overseers of the Poor of the said Parish of St. Bartholomew
the Less, touching the Premisses; and upon full Examina-
tion of the Matter of the said Petition and Appeal; IT DOETH
APPEAR in Evidence to this Court, and is admitted by all
Parties, That Henry the Eighth, late King of England, by
Charter, bearing Date the 13th Day of January in the 38th
Year of his Reign, did, amongst other Things, grant to the
Mayor and Commons and Citizens of the City of London,
all the late Hospital of St. Bartholomew in West Smithfield
next London, and all other Things whatsoever to the said
Hospital appertaining or belonging; and also all the Scite,
Compass, Circuit, and Precinct, and the Close of the said
late Hospital; and by his said Charter did grant to the said
Mayor and Commons and Citizens, Lands, Houses, Gar-
dens, Rents, Reversions, and Hereditaments, amounting to
a considerable Value; to hold and enjoy the same for ever,
to their own proper Use and Behoof; and thereby directed
that the said late Hospital of St. Bartholomew’s should there-
after be a Place and House for the Poor there to be placed,
and should be called “ The House of the Poor, in West
Smithfield next London, of the Foundation of King Henry
the Eighth.” It appears, that ever since the said Grant,
the

the said Hospital has been made Use of for the Relief of sick wounded and diseased Poor, where Thousands are annually relieved and cured; and that soon after the great Fire of London, Houses and Shops were made in the Buildings within the Cloisters and Precinct of the Hospital, for Convenience of the Inhabitants of London (then in great Distress for Houses,) who, occupying the same for their own Benefit, become rateable and chargeable to the Poor's Rates. That about the Year 1730, some of the *ancient* Buildings and Wards of the Hospital, and some of the said Houses and Shops having became ruinous, were pulled down; and, by the Donation of the Governors and other Benefactors, Four large Piles of Buildings have been progressively erected, and are now used for the Hospital; One of which Piles or Wings contains a Hall, a Compting-House, and other Rooms, which are used for Meetings for the Governors, receiving Rents, and Examining and Admission of Patients, a House for the Clerk, and Apartments for the Steward; and the other Three Piles of Buildings are used for *Wards for the Patients and their Nurses only*; and that an *Elaboratory* also has been erected, for the Service of the Hospital only, upon Ground within the Liberty and Precinct thereof.

That one of the said Piles or Buildings of the Hospital being finished about the Year 1758, the Churchwardens and Overseers of the Poor of the Parish of St. Bartholomew the Less, assedged and rated the said Governors, *for such Wards for the Poor*, the Sum of 20*l.* for and towards the Relief of the Poor of the said Parish, as and for Lands *on which stood* Tenements and Houses by them pulled down and demolished, the Tenants whereof *were used to be charged* in the Poor's Rate at 8*s.* 4*d.* weekly; and have continued that Rate, ever since. And that the said Parish-Officers have assedged and rated the Governors to the said Parish Poor's Rate, 2*l.* 8*s.* per Annum, for and in respect of such *Elaboratory*, where Houses stood, which were *used to be charged* to the Poor's Rate, by quarterly Assessments.

That all the said Four Piles of Buildings being finished in 1766, the Governors pulled down Nineteen old Houses and Shops (part of the said ancient Buildings,) to make an *Area* to the Hospital, for the Benefit of the Patients; which is a wide Space of Ground, of about 66 Yards by 60; for which, the Parish-Officers have assedged and rated the said Governors at 4*l.* 5*s.* per Annum; which is 10*l.* 6*s.* 3*d.* per Quarter; and which said Sum of 2*l.* 8*s.* 20*l.* and 40*l.* 5*s.* making, in all, 63*l.* 13*s.* are over and above what is charged upon their respective Officers residing in this Hospital, and were for the Year 1767, and now continue to be assedged and rated on the said Governors, in respect of the Premises.

And

AND it further appears to this Court in Evidence, and is admitted by all Parties, that several Persons who have gained Settlements in the Houses so pulled down, have been and are now relieved by the said Parish of St. Bartholomew *the Less.*

WHEREFORE this COURT doth allow the said Appeal, and doth quash the said Rate, so far as respects the several Assessments abovementioned: And the same is hereby quashed.

By the COURT—

H O D G E S.

This Order being removed hither by *Certiorari*,

The QUESTION was—“ Whether the Governors of the Hospital are or are not *rateable to the Poor*, in respect of the Buildings and Area above mentioned.

Lord MANSFIELD—The Poor-Rate must be charged upon the Occupiers. In the Case of *St. Luke's Hospital**, * V. ante, and in the Case of *Chester Hospital*, the Officers were rateable, as Occupiers. The Corporation are not, *de facto*, the Occupiers. The Poor are Occupiers: But they are not rateable.

The general Rule of Law must be followed. That Rule is “ That you must find an Occupier †, to be rated.” The † V. ante, poor People can not be rated at all. The Servants can not be rated as Occupiers: Nor can the Corporation be charged, as Occupiers.

The Consequence is, that the Rule must be discharged.

ORDER OF SESSIONS AFFIRMED.

Gros *versus* Nash.

Monday 5th
June 1769.

NOTE—A *Scire facias in Error* needs not lie in the Office four Days before the Return of it; as a *Scire facias against Bail* must †.

Mayor *versus* Steward.

Tuesday 6th
June 1768.

THE Declaration states that by Indenture dated 11th July 1761, which recited a former Indenture of the 14th June 1760, whereby Jonathan Clarke demised to the Plaintiff and Defendant, then Brewers and Copartners, a Malt-house and other Buildings at Knightsbridge, for Fifteen Years and

† Vide ante,
Millar v. Yer-raway, ac-
cord.

and Three Quarters, at the yearly Rent of 18*l.* the Plaintiff released to the Defendant all his Estate and Interest in the same Malthouse and Premises, for the Residue of the Term. And the Defendant covenanted with the Plaintiff, by this latter Indenture, that he the said Defendant would pay the yearly Rent of 18*l.* and perform the Covenants on the Lessee's Part, and indemnify and save harmless the Plaintiff on Account thereof. All which he had neglected and refused to do. The Breach was assigned in Non-payment of the Rent; in not repairing the Premises; and in not indemnifying the Plaintiff; to his Damage 300*l.*

The Defendant pleaded Three Pleas. 1st. That he became a Bankrupt after the making of the Indenture dated 11th July 1761; and that the Causes of Action accrued to the Plaintiff before he (the Defendant) became a Bankrupt. And of this, Issue was joined.

There were Two other special Pleas in Bar: One as to the Non-payment of the Rent, and not indemnifying the Plaintiff; the other, as to the not repairing. They were Both to the same Effect. They stated the Commission, and the Assignment of his Effects; and that he had duly conformed to the several Statutes concerning Bankrupts, and had duly obtained his Certificate.

To the first Plea, the Plaintiff (as is before mentioned) joined *Issue*: To the Second and Third, he demurred, generally; and there were Joinders in Demurrer.

The Issue was tried before Mr. Justice *Aston*, in Michaelmas Term last; when a Verdict was found for the Plaintiff, and Damages 44*l.* 13*s.* subject to the Opinion of the Court upon the following

CASE—That the Plaintiff and Defendant were Partners in the Trade of a Brewer at *Knightsbridge*; and were joint Lessees of the Malthouse and other the Premises mentioned in the Declaration.

The Defendant purchased the Plaintiff's Share of the Stock in Trade, in Consideration of 5*l.* and took an Assignment of the said Lease, dated 11th July 1761, and containing the several Covenants mentioned in the Declaration.

The Plaintiff was also Original Lessee, with former Partners in the said Trade, of a Brewhouse together with 15 public Houses, as appurtenant to their Trade.

The Brewhouse and the several last mentioned Leases were also assigned to the Defendant by the abovementioned Deed, and

and under like Covenants ; and he became possessed of the several Premisses therein mentioned.

Afterwards, on 15 Nov. 1764, a Commission of Bankruptcy issued against the Defendant : And *Nathaniel Mason* and *Dyer Bond* were chosen Assignees ; and a regular Assignment was made to them of all the Estate and Effects of the Bankrupt.

The Assignees entered on the said Brewhouse and Malthouse, and stripped all the Fixtures and Utensils therefrom ; and sold and assigned the Leaves of all the public Houses, to Messrs. *Cafe* and *Cox*, Brewers, in Consideration of 700l. or some such Sum of Money ; and, having so stripped the Premisses, used their Endeavours to dispose of the Leaves of the Malthouse in Question and of the Brewhouse, both by public Auction and by private Contract ; but not being able so to do, they abandoned the Premisses at *Lady-Day* 1765, as unprofitable ; and sent the Leaves and Keys to the Plaintiff, having first paid the Rent up to that Time.

The Plaintiff thereupon refused to accept the Possession, from the Assignees, of the Brewhouse and Malthouse alone ; or to have any Thing to do with those Premisses or the Leaves or Keys thereof ; but offered to accept a Re-assignment of the *Whole* of the Leashold Premisses assigned by him to the Defendant, *entire* : Which the Assignees refused. And the legal Estate, as well as Possession, is now vested in them.

The Plaintiff filed his Bill in the Court of Chancery, against the Assignees and the Defendant the Bankrupt, 14th March 1767 ; and therein alledged " That he had been damaged " in respect of the Malthouse mentioned in the Declaration " 28l. 1s. and was still liable to the Rents and Repairs of " those Premisses during the Remainder of the Term of the " Lease : He therefore prayed that the Assignees might be " decreed to pay him the said 28l. 1s. and to indemnify him " out of the Bankrupt's Effects, against the future growing " Rents ; and might retain sufficient in their Hands for that " Purpose, and not divide the same until the Plaintiff should " have been released and discharged from the Covenants in " the said Lease."

The Cause came on to be heard before the Lord Chancellor, the 10th May 1768 : And a Decree was made to the following Effect ; viz. " That the Plaintiff should be at Liberty " to come in as a Creditor, under the said Commission against " the Defendant, for the Sum of 28l. 1s. and to prove any " other Sums that he hath been damaged by the Covenants " in the Original Lease, since filing his Bill ; and to receive " a Dividend in respect thereof, in Proportion with the Rest " of

" of the Creditors seeking Relief under the said Commission ;
 " and that the Rest of the Plaintiff's Bill should stand dis-
 " miss'd."

A final Dividend of the Bankrupt's Estate was made on 28th June 1768 : At which Time the Plaintiff was damnified by a Breach of the Covenant in the original Lease of the Malt-house, to the whole Amount of the Sum mentioned in the Declaration ; viz. 54*l.* for Three Years Rent commencing at *Lady-Day* 1765 (when the Assignees abandoned the Malt-house,) and ending at *Lady-Day* 1768 ; and One Guinea for Costs of an Action brought against him : making together 55*l. 1s.* And although the Plaintiff might have come in as a Creditor under the Commission, under that Decree, and have proved the Whole in Consequence thereof ; yet he only came in as a Creditor for the said Sum of 28*l. 1s.* Part thereof, and hath received Two Dividends thereon, amounting to the Sum of 11*l. 7s.* and hath brought his Action to recover the Sum of 43*l. 14s.* being the Residue of the said 55*l. 1s.*

The Defendant obtained his Certificate on 7th January 1765 : Which was duly allowed, and confirmed by the Lord Chancellor, on the 19th February following. The several Breaches of Covenant above mentioned happened *subsequent* to the Act of Bankruptcy, and the Defendant's obtaining the said Certificate.

The Question therefore is—" Whether the Plaintiff ought
 " to recover."

This reserved Case came before the Court on *Tuesday* last, the 30th of May ; when Mr. Justice Yates observed, that the proper Question of Debate would be " Whether the Bank-
 " rupt being divested of his All, and disabled from paying
 " any Thing, is not also DISCHARGED from all Covenants." But this Question can never come to a Determination upon *this issue*. The Demurrs ought to have been argued first : And then the Question would have properly come before the Court—" Whether the Bankrupt is not discharged from the
 " express Covenant, when he is rendered absolutely inca-
 " pable of performing it, by having surrendered his All to
 " his Creditors under the Commission, in Conformity to the
 " Statute concerning Bankrupts."

The Court agreed that nothing could be done upon *this Issue*, to determine *that Question*.

The Case reserved at *Nisi Prius* was therefore Ordered to stand over, till the Demurrs should be argued.

Mr. Mansfield now argued the Demurrsers, on behalf of the Plaintiff.

The material Part of the Pleas is “ That the Cause of Action accrued *after* the Bankruptcy.”

The Covenant on which the Question upon the general Plea arises, is a Covenant to indemnify the Plaintiff against the Covenants of the original Lease.

The Plaintiff can not be barred of his Action otherwise than by 5 G. 2. c. 30. § 7. which discharges conforming Bankrupts from all Debts due or owing at the Time of their becoming Bankrupts. But this was not a Debt due or owing at the Time of his becoming a Bankrupt. This Plea indeed alleges “ that the Cause of Action accrued *before* the Bankruptcy.” But the Evidence proves “ that it did not arise till *after* :” It was contingent till after the Bankruptcy.

Mr. Justice YATES—No Doubt, the Act does not discharge the Bankrupt from contingent Debts. But as it divests him of his whole Estate, and renders him *absolutely incapable of performing the Covenant*, it would be a Hardship upon him, if he should remain still liable to it, when he is disabled by the Act of Parliament from performing it.

Mr. Mansfield—Then, putting the special Case reserved at *Nisi Prius* out of the Question, and taking it up upon the Two other Pleas—This is a Covenant by the Bankrupt, to indemnify the Plaintiff against Covenants contained in a Lease: Which Lease was assigned by the Plaintiff, with all his Interest in it, to the Defendant, for his (the Defendant's) sole Benefit; and he covenants to indemnify the Assignor.

This Covenant to indemnify the Assignor who has parted with all his Interest to him; and to pay the Rent, and repair the Premises now become his own sole Property, is but just and reasonable: And the Bankrupt can not be discharged from it; the Covenant being an *express* Obligation.

And there is no more Hardship in subjecting the Bankrupt to this Demand, than to any other contingent Demand.

Neither is there any Difference between the Bankrupt's undertaking to indemnify against his own not paying Rent, and his undertaking to indemnify against another Person's not paying Rent.

It is settled, "that contingent Debts are not discharged by a Certificate under a Bankruptcy." 2 Strange 865. *Tulij v. Sparkes*, 2 Stra. 1043. *Hockley v. Merry*. 2 Stra. 1160. *Crookshank v. Thompson*—A Bond "to indemnify" is not discharged, where the Breach of the Condition is after a Bankruptcy.

Mr. Grose, *contra*, for the Defendant.

In this Action of Covenant, Three Breaches are assigned: *viz.* for Non-payment of Rent; for not keeping in Repair; and for not indemnifying.

The Defendant admits all the Charges; but pleads that he became a Bankrupt, and had surrendered up all his Effects under the Commission, and assigned them to his Creditors: And therefore it is impossible for him to perform Covenants.

A Man can not be bound by a Covenant, when the *Act of Law* has taken the Emolument from him, and vested it in another.

The Defendant is under these Circumstances: And the general Question is "Whether the Plaintiff can call upon such a Defendant, for the Performance of his Covenants."

He argued from the Intention of the Legislature in the Bankrupt Acts; and the Decisions of Courts of Justice in Favour of Bankrupts.

The Statute of 34 & 35 H. 8. c. 4. seems indeed to have considered Bankrupts as *Criminals*: But modern Statutes have only considered them as *unfortunate Traders*. (*Vide* 5 G. 2. c. 30.)

The Bankrupt is not now the real Tenant. He is so defrauded, that he has no Remedy against the *actual Tenant*: And therefore he ought not to be liable himself.

The Landlord is under no Hardship: For, he may enter, for Breach of the Covenant to pay Rent, and of the Covenant to repair.

In the Case of *Andrews v. Needham*, Nov. 75. A Lessee for Years covenanted "to yield up at the End of the Term." *Blunt* entered by an Elder Title. The Defendant was holden to be discharged of his Covenant. For, if the Land is gone, the Obligation is discharged.

Here,

Here, the Land is gone ; and the Bankrupt is deprived by Act of Law, of the Ability to perform the Obligation.

It was urged, " that here is an *express* Covenant."

But here the Premisses are entirely gone *out* of the Defendant : He can never enjoy them. Therefore he ought not to be bound, even by an *express* Covenant.

On the *first* Plea—He argued " that the Cause of Action " accrued *before* the Bankruptcy." And this, he said, might be collected from 5 G. 2. c. 30. and the Cases determined upon it ; and it was the *Idea and Intention* of the Legislature : Though, he acknowledged, the *Words* were against him. He cited 2 Stra. 949. *Macarty v. Barrow* ; and 2 Stra. 1196. *Graham v. Benton*. He owned that the anonymous Case in 1 *Atkyns* p. 140. was against him : But that, he said, was afterwards over-ruled, on 6th August 1757. *ex parte Talbot*, before Lord Northington. He also mentioned a Case of *Francis v. Lutterel* in Chancery, last Trinity Term, before Lord Camden, in *Hagen's* Bankruptcy. And he said, that in all these Cases, the Words of 5 G. 2. c. 30. were considered with great Liberality.

Here, what *was* due at the Time of the Bankruptcy, and what *would* be afterwards due, *might* have been liquidated.

This Covenant might have been considered as a *Security for the Rent*.

Mr. *Mayo* actually came in under the Commission, as a Creditor for this *very* Demand. Consequently, it was not a contingent Debt. The Court of Chancery has let him in, to prove it.

The whole Benefit of this Covenant accrues to the Bankrupt's Creditors, Therefore he himself ought not to remain liable.

Besides, Mr. *Mayo* having come in and claimed, and received a Dividend under the Decree, he ought not to have a Remedy against the Defendant's Person. It is an Oppression ; and is so treated in 2 *Peere Williams* 395. He has already made his *Election* ; and therefore ought not to be in a better Situation than the Rest of the Creditors, and have it in his Power to take out another Commission against the unfortunate Bankrupt.

Mr. *Mansfield*, in Reply—As to what Mr. *Grose* has last said—The *express* *Words* of the Act of Parliament are " That

" the

" the Bankrupt shall be discharged from all Debts due or
 " owing at the Time of his becoming Bankrupt."

The Contest before the Lord Chancellor was only between the Assignee and the Creditors ; not between the Assignee and the *Bankrupt*.

Upon *this* Plea, the Plaintiff can not be barred.

As to the Hardship—It is just the same as in *other* contingent Debts.

If it had been the Intention of the Bankrupt-Laws, that contingent Debts should be discharged, the Legislature would have used other Language than they have done. This Man has *expressly* covenanted to do these Things : And therefore he is still bound.

I agree " That the Act of Law shall do no Man an Injury." But that does not apply to the present Case. No more does the Case cited from *Noy*.

The present Plaintiff can by no means get rid of this Lease. Nothing appears upon the present Record, whereby this Covenant to indemnify, can be discharged.

THE COURT were cleatly of Opinion, That as this was not a Case between Lessor and Lessee, (in which Case it might have seemed hard to leave the Lessee liable to the Covenants, when an A&t of Law had deprived him of the Emoluments, and vested them in his Creditors;) but a distinct, detached, collateral, independent Covenant and Contract between the Plaintiff and Defendant ; and the Plaintiff could have had no Remedy under the Commission ; the Bankrupt was not discharged by the Certificate. It is his own express collateral Covenant ; not a Covenant that runs with the Land. A third Person ought not to be prejudiced by the Bankrupt's Breach of it.

The Plaintiff could not have been admitted under the Commission, to have proved this as a Debt : For it was *not* a Debt at the Time of the Bankruptcy : It might, perhaps, never have been one.

Judgment ought to be for the Plaintiff.

JUDGMENT for the PLAINTIFF, upon the DEMURRERS : And (on the special Case) PLAINTIFF to have the POSTEA delivered to him.

Slaughter

Slaughter Esq. *versus* Bradock.

THE VENUE, originally laid in *London*, had been changed to the County of the *City of Chester*, upon the Common Affidavit, on the Motion of Mr. *Ashurst*, made on behalf of the Defendant.

Mr. *Wallace* obtained a Rule for the Defendant to shew Cause why Mr. *Ashurst's* Rule should not be discharged ; on Affidavit " That the Cause of Action arose on a *By-Law* of the *City of Chester* ; and that it could not be fairly and impartially tried in the *City of Chester*, because the Jurors were interested."

Mr. *Ashurst*, on behalf of the Defendant, now shewed Cause against this Rule. He did not pretend that the *City of Chester* was a proper Place to try the Cause in : But he urged the great Inconvenience of bringing up the Defendant's Witnesses from *Chester* to *London* ; and proposed that the Venue should be laid in some County adjacent to *Chester*. But

Lord MANSFIELD observed, that that could not be ; because the Cause of Action did not arise there. [Vide post, p. 2450. *Waddington v. Thellwell Esq.*]

THE COURT held, that as the Action was *transitory* the Plaintiff had a general Right to lay it where he pleased ; And the Venue should not be changed, if it appeared that the County in which the Cause of Action really arose was an IMPROPER County to try it in. And therefore,

Mr. *Wallace's* RULE was made absolute.

Doe, Lessee of Hardman, *versus* Pilkington and Russel. Saturd. 10th June 1769.

IN EJECTMENT—A Rule had been made upon the Defendants, to shew Cause why, upon Payment of Costs, the Declaration delivered in this Cause should not be AMENDED, by striking out the Words " First Day of May in the Year of our Lord 1759," and inserting, instead thereof, " First Day of November in the Fifth Year of his said Majesty's Reign ;" and by the striking out the Words " Thirtieth Day of April," and inserting, instead thereof, the " Thir-ty-first Day of October ;" and also by striking out the " First Day of May in the Year of our Lord 1759," and inserting, instead thereof, " said First Day of November in the said Fifth Year of his said Majesty's Reign :" Upon the Motion.

Note—

Note—This Case was so circumstanced, that Plaintiff would have been *barred* by a Fine, if he had been put to bring a *new* Ejectment. For, the Declaration was delivered Four Years ago; when the Defendant pleaded: but nothing had been done since; the Plaintiff having been stayed by an Injunction out of Chancery, which had been but lately dissolved. The Ejectment was brought upon an Entry made to avoid a Fine: And the Plaintiff was now out of Time to make a new Entry.

On *Tuesday* the 6th of this Month, Mr. Wallace shewed Cause against thus amending the Declaration by altering the Time of the Demise; and cited *Cartheu* 178. *Bennet v. Gandy*; where Leave was prayed to amend the Declaration, by altering the Time of the Demise: But it was refused; because, if the Time was altered, that would make it a *new* Demise.

* I don't find this *Cafe* He also cited *P. 11 G. 2. B. R. Caseworth v. Thomas*; which, he said, was a like Determination *.

amongst my own Notes. But in 1 Ventr. 361. and 1 Show. 207. Holt Chief Justice held it *not* amendable. So is 2 Barnes 13. *Driver v. Scrutton*. So was Raffey, ex dimiss. *Lethieullier v. Hanbury*. M. 5 G. 2. B. R.

† In the 4to Edition, et al. It was denied to amend the Demise in Point of Time; tis p. 17. and said to be never done without Consent. And in 2 Barnes 154. *Roe v. Doe*, on the Demise of *Stephenson*—“ It can't “ be amended in the Demise, or other Matter of Substance.”

He cited, likewise, *Cartheu* 401. *Puleston v. Warburton*. 5 Mod. 332. S. C. and 2 Strange 1211. *Goodtitle v. Meyott*.

On the other Side, see the Case of *Afelin v. Parkin*, ante, vol. 2. p. 665. where all the Judges unanimously held “ That “ an Ejectment was to be considered as the *fictitious* Form “ of an Action invented under the Control of the Court, for “ Advancement of Justice; and a Mode to try the Right in “ Question.”

And it was said, that on 15th August 1768, Mr. Justice *Yates*, sitting in Bank at *Lancaster*, ordered a Declaration in Ejectment to be amended. There was also a *Cafe* very liberal in Favour of Ejectments, which was not mentioned at all. It was *Small, ex dimiss.* *Baker, v. Cole and Skinner* in Easter Term 1761, 1 G. 3. which see ante, p. 1161.

Mr. Justice *YATES* and Mr. Justice *ASTON* thought that the Plaintiff's being out of Time to make a new Entry was a Reason for amending; and cited the Case of *The Executors* of

of the Duke of Marlborough v. Widmore, in 2 Stra. 890. [and also, more at large, and rightly taken, in *Fitz Gibbon* 193] where the Declaration was amended by laying the Promise as made to the Executors, instead of the Testator; because the Plaintiff's Action would otherwise have been lost, by the Statute of Limitations, having run upon the Promise made to the Testator.

Lord MANSFIELD—An Ejectment is a mere fictitious Action. The Demise is mere Matter of Form: It does not exist. It is not like a real Title.

THE COURT's final Determination was, however,
ADJOURNED.

Lord MANSFIELD now declared it—

It appears upon the Affidavits, that this was an Entry to avoid a Fine; and the Demise is laid *before* the Plaintiff had made the Entry, instead of being laid *after* the Entry.

We are all clearly of Opinion that he ought to be at Liberty to amend upon Payment of Costs.

Mr. Justice YATES—It is a clear Mistake of the Plaintiff's * Attorney.

RULE made ABSOLUTE. *Sect. ante,
1162. Small,
ex Dimiss.
Baker, v.
Cole and
Skinner.

Beach, qui tam, *versus* Turner.

AN Action having been brought for exercising the Trade of a Currier, without having served an Apprenticeship, It appeared upon the Trial, that the Defendant was only a Journeyman. Whereupon Lord Mansfield nonsuited the Plaintiff. And

This was merely a Question upon Eliz. c. 4. § 31. "Whether the Statute extends to Journeymen, or only to Masters."

On the last Day of last Term, Mr. Solicitor-General (Dunning) Council for the Plaintiff, obtained a Rule for the Defendant to shew Cause why the Judgment of Non-suit should not be set aside, and a new Trial had.

Mr. Wallace, on behalf of the Defendant, now shewed Cause. He insisted "That a Journeyman is not within this Statute;" and cited Hobbs, *qui tam*, v. Young, 2 Salk. 610. Cartbew 162. S. C. [It is also in 4 Mod. 313. Comberb. 179. and 1 Show. 241, 266.]

Mr. Solicitor-General and Mr. Walker, in Support of the Rule argued that the Act extends to the Journeyman, as well as to the Master; and that Both of them are within the true Meaning and Spirit of the Clause, and even within the Expression of it too. For, the Words are in the Disjunctive—“ It shall not be lawful to set up, occupy, use, or exercise;” Now the Servant uses and exercises the Trade or Occupation as much as the Master; though perhaps he can’t so well be said to *set it up*: And therefore the Legislature adopt the Words “ use or exercise” the Craft Mystery or Occupation. They cited *Raymond v. Chase*: (Which may be seen *ante*, vol. 1. p. 2.)

Lord MANSFIELD—I continue of the same Opinion that I was of at *Guildhall*. There is a great Difference between *setting up* a Trade; and *working in it*. A Man may *work in it*, by doing a very trifling Part.

This Act of Parliament meant to prevent Persons from *setting up* the Trade, being unqualified for it; or *employing unqualified Persons*: But it did not mean to give a Penalty against Both. A Journeyman does not exercise the Trade.

I am satisfied that the Spirit of the Act means to prevent the *Master only*, from setting up the Trade, Himself being unqualified; or *employing unqualified Persons*; but that it was not intended against the *Journeyman himself*.

Mr. Justice YATES and Mr. Justice ASTON concurred.

Per Cur’. unanimously—

RULE DISCHARGED.

Monday
12th June
1769.

Waddington *versus* Thellwell Esq.

UPON the First Day of this Term, Mr. Kenyon moved to change the Venue from Middlesex to DENBIGHshire.

But Mr. Cowper, the Clerk of the Rules, objected to the Regularity of a Motion “ to change the Venue into a Welch County.”

The COURT, having the same Scruple, desired Mr. Kenyon to look into the Cases; particularly two in Sir John Strange’s 2d Volume, *Moore v. Fennybouth*, p. 1258, and *Tindale*

Tindale v. Gwynne, p. 1270; and a later Case in this Court, of *Richards et Ux. v. Traberne*, *Pasch* 1755, 28 G. 2.

Mr. Kenyon answered, that though the Venue should be changed into a Welch County, yet the *Process* would be directed into the next English County: So that it would be tantamount to changing it into the next English County.

It was adjourned, in Order that Mr. Kenyon might look into the Cases, and move it again.

On the Day following, (which was Saturday 27th of May) Lord MANSFIELD told Mr. Kenyon, that the Cases of Motions to change the Venue into Wales, had been looked into; and that the Point remained undetermined.

Mr. Justice Aston observed that it could not be removed into the next English County; because the Cause of Action did not arise there. Mr. Justice Denison, when at the Bar, had in several Cases agreed to give material Evidence in the Welch County. He said, He did not see why it might not be changed into Wales: And in the Case of *Richards et Ux. v. Traberne*, he mentioned the Case of *Sir Thomas Stradling v. Morgan*, in *Plowden* 200. where the Venue was laid at *Cardiffe* in *Glamorganshire*; and the *Venire facias* was awarded to the Sheriff of *Herefordshire*, the next adjoining County; to summon a Jury from the Neighbourhood of *Leominster* in *Herefordshire*, which is the Visne next adjoining to the Town of *Cardiffe*. The Reason why it cannot be changed into the next English County is (as it was there said) "that the Cause of Action did not arise in the County to which it is prayed to be changed."

Though the Case of *Richards v. Traberne* was not determined*, yet the Arguments there used were very strong for changing the Venue into a Welch County.

12th May 1755, by Mr. Price (for changing the Venue from Middlesex to Glamorganshire,) and Mr. Hume Campbell and Mr. Aston (against changing it.) It was agreed, that Cases were both Ways. The Rule was enlarged: But it never came on again. I believe, the Cause was afterwards tried at Hereford.

* It was argued on Monday

It is a great Inconvenience, not to be at Liberty to change it into a Welch County; but to be obliged to bring Witnesses to a great Distance.

+ Though Sir John Strange made his Rule absolute, for changing the Venue from London to Carmarthen, on Affidavit of Service, in the Case of *Tindale v. Gwynne*: yet

Note of a Case in this Court, in

Trin. 1748,

21 & 22 G. 2, *Price v. Griffiths*, where the same Point was twice discussed, both at the Bar and on the Bench; but it was left, at last, undetermined. Sir John Strange there attested, that the Court were apprized of the Rule he made absolute in *Tindale v. Gwynne*.

the Court would not have made such a Rule absolute, if they * Noble *v.* had thought it a wrong one. And * Six or Seven Cases were Tindall, M. cited by Mr. Price, to prove "that was the constant Practice 24 G. 2. " in the Court of Exchequer."

v. Gardiner,

P 4 G. 2. Clark *v.* Philips, M. 8 G. 2. Perry *v.* Pease, Tr. 13 G. 2. Stent *v.* Owen, 22 G. 2. Stent *v.* Angel, M. 22 G. 2.

A RULE was therefore granted to shew Cause why this Venue should not be changed from Middlesex to Denbighshire.

Lord MANSFIELD said he did not at first see why the Court should refuse to change it into the next English County; as the same Reasons seemed to hold for doing that, as for changing it from one English County into another English County. But Mr. Justice Denison had satisfied him that there was a good Reason for refusing it: Which is, that the Form of the Affidavit is so religiously settled, that it can not be departed from; and in the Case of changing it to the next English County, they can not swear in that Form which is essentially requisite on such Motions; namely, That the "Cause of Action AROSE IN the County into which it is " prayed to change the Venue; and not elsewhere, out of the "said County," (where it was originally laid)

On Thursday the 1st of this present Month of June, Mr. Kenyon moved to make the Rule absolute, upon an Affidavit of Service.

And there being no Defence —

The RULE was made ABSOLUTE.

Rex *versus* Dr. Pettiward et al. Justices of Peace for Surry.

ON Tuesday 31st of January last, Sir Fletcher Norton and Mr. Cox shewed Cause against a Mandamus, to be directed to the said Justices of Peace, commanding them to appoint Surveyors on the Highway for the Parish of Battersea, out of a List returned to them on the Part of the Parish; all of whom they had rejected, and had appointed another Person not named in the said List.

The Cause they shewed was, that the List returned to the Justices was not a regular List, agreeable to the Directions of the late Act of Parliament of 7 G. 3. c. 42. s^t. 1. Nor was the Assembly holden on the 22d of September 1758, who made this List, and returned it to the Justices, regularly holden; several of the necessary Parish Officers not being present.

1st. There

1st. There was no Churchwarden present, no Titlingman, no Headborough, no Constable: Whereas the Act directs, "that upon 22d September in every Year, (unless that Day shall be Sunday, and then on the Day following,) the Constables, Headboroughs, Titlingmen, Churchwardens, Surveyor or Surveyors of the Highways, and Householders, being assessed to any parochial or public Rate, shall assemble together at the Church &c.; and the major Part of them so assembled, shall make a List &c."

2dly. It had *Marks of Fraud* upon it: For, it was *intitled* as if all these Persons *had* been present.

3dly. It was made at a riotous Assembly of the lower Sort of People; and consisted of improper Persons.

They offered Affidavits in Proof of their Allegations. But

Lord MANSFIELD and Mr. Justice YATES said—We can't determine this, upon *Motion*: The other Side have no Opportunity of controverting these Affidavits. It is upon a *new* Act of Parliament. The Justices must make a *Return*.

The RULE was made absolute, for a MANDAMUS.

To this Mandamus the Justices returned the first Objection abovementioned. Upon which, a Motion was made for an Information against them for a false Return: And a Rule "to shew Cause" was granted upon that Motion.

On shewing Cause, now, against such Information,

The Question intended to be brought before the Court was—"Whether it was *essentially requisite*, that *some* Person or Persons of *each* Body particularly specified in the Act of Parliament, (Constables, Headboroughs, Titlingmen, Church-wardens, Surveyors, and Householders,) should be present at the Parish Meeting appointed for naming Persons to be returned to the Justices?" Or, in other Words, "Whether the Constables, Headboroughs, Titlingmen, Church-wardens, Surveyors, and Householders, were made *CONSTITUENT* Parts of such Assembly, so that some of each Body must necessarily be present, as being of the Quorum."

The COURT had great Difficulty, how to come at this Question in the Situation of the present Case.

They thought proper to discharge the present Rule.

But

But they seemed to incline very strongly, that the Legislature only meant it to be a full parochial Meeting, *without* intending that Each of these Bodies should be such *essential* constituent Parts of it, that their *Acts* would be annulled and made void by the Absence of the Churchwardens, or of the Constables, or Headboroughs, or Tithingmen, or other respective Denomination.

Mr Justice ASTON observed, that a Constable might perhaps *die* just before the Meeting ; or might absent himself *on Purpose* to frustrate the Effects of the Meeting : And it was not probable that the Legislature meant that such Absence should render the *Acts* of the Meeting null and void.

Tuesday
13th June
1769.

Taswell *versus* Stone.

THIS was an Action of Debt on a former Judgment : And Judgment was signed in the present Action, for want of a Plea.

Mr. Wallace, on behalf of the Plaintiff, shewed Cause against a Rule which had been obtained by Mr. Mansfield, for the Plaintiff to shew Cause why the Judgment signed in this present Action should not be set aside : and further Proceedings in this latter Action stayed, until the Determination of the Writ of Error now depending upon the *former* Judgment upon which this latter Action is brought.

There was an Affidavit on the Part of the Defendant,
 " That the Plaintiff did, in *Trinity* Vacation last, bring his
 " Action against the Defendant ; and obtained Judgment
 " against him. That the Defendant thereupon brought a
 " Writ of *Error*, and hath transcribed &c : And it still re-
 " mains *undetermined*. That Two or Three Days before
 " this present *Trinity* Term, the Defendant was served with
 " a Copy of a Bill of *Middlesex*, in a Plea of *Debt on the*
 " *said Judgment* obtained against him as aforesaid : And
 " on the first Day of this present *Trinity* Term, the Plaintiff
 " caused to be filed a Declaration *de bene esse*, in the latter
 " Action, against the Defendant, and hath *signed Judgment*
 " against him for want of a Plea ; although the said Pro-
 " ceedings in Error have been regular, and are not yet de-
 " termined."

Mr. Wallace urged, that there was no Pretence for setting aside this latter Judgment : And the Defendant came too late, even to stay Proceedings upon it ; because Execution was gone out upon it, and the Sheriff is actually in *Possession* upon this Execution.

The

The COURT was clear, that there was no Reason to *set aside* this latter Judgment: But on the other Hand, it was highly proper to *stay Proceedings* upon it; as it would be unreasonable that the Plaintiff should proceed in *executing* a Judgment which would of Course fall on the Ground, in case the original Judgment, upon which it was founded, should be *reversed*.

Mr. Wallace then prayed, that the Defendant might be restrained from bringing a Bill in Equity.

THE COURT thought this reasonable: And Mr. Mansfield consented to it.

Bertie *versus* Pickering et Ux'.

THIS was an Action of Trespass. One of the Counts was "for taking Goods," generally; *without specifying the Particulars*. A general Verdict had been found for the Plaintiff; and One Penny Damages.

On Saturday the 15th of April last, Mr. Lucas moved in Arrest of Judgment, upon the Authority of *Wyat v. Effington*, in 1 Strange 637*: And had a Rule to shew Cause.

Mr. Serjeant Burland and Mr. Barnes now shewed Cause.

* Vide 2
Ld. Raym.
1410. S.C.

There is a Distinction between *Trover* and *Trespass*. 2 Strange 1094. *Smalley v. Kerfoot et Ux'*: And more fully, in *Andrews*, 242 to 247. S. C.

And here the Particulars are specified in other Counts in the Declaration. After a Verdict, if the Value be not set forth in the Declaration, it is nevertheless good. It would be good in an Action for Goods sold and delivered. The same Reason would hold there, as in Trespass.

They are too late with their Motion in Arrest of Judgment. They might have taken Advantage of it on their Demurrer; But that they have withdrawn. 1 Strange 425. *Edwards v. Blunt*. However, the Declaration is certain enough. 1 Inst. 303.

There is a Difference, where a *specific Thing* is to be recovered; and where *Damages* only are to be recovered, and not the Thing itself. For which Distinction, they cited 1 Lew. 303. *Jenny v. Norris*. They also cited Cro. Jac. 664. *Bancroft v. Coo*; and Cro. Jac. 435. *Johns v. Wilson*.

Lord

Lord MANSFIELD—I am thoroughly satisfied with the Reason why in an Action of Trespass for Goods taken away, the Particulars ought to be specified : For, how can the Defendant justify, unless the Goods are specified ? How can he justify taking *divers* Goods ?

* The Rea- The true * Reason is, “ That the Defendant can not justify, son given in “ unless the Particulars are specified.”

2d Lord

Raym. 1401. is “ that the Recovery could not be pleaded in Bar of *another* Action brought “ for the same Goods.” In Stra. 637, no Reason at all is given.

Mr. Justice YATES concurred in this as the true * Reason.—This is a general Verdict : And therefore if one Count is bad, the Judgment must be arrested.

Ter Curr.

JUDGMENT ARRESTED.

Rex *versus* Inhabitants of Clace in the County of Glamorgan :

Or, Rex *versus* Lewis and Seven Others.

ON Monday the 5th of this Month, Mr. *Ashurst*, on behalf of the Defendants, moved for a PROCEDENDO to a Certiorari to the Quarter Sessions of the Peace for the County of Glamorgan in Wales, “ to remove an Indictment from thence into this Court :” For that an Indictment ought not to be removed up hither, in the first Instance ; there being a Court of Grand Sessions there. They can not come hither *per Salum*. The Indictment was for not repairing a Highway, which it charged the Defendants to be bound, *ratione tenure*, to do.

*Videante, He cited *Rex v. Gwynne et al*’; Hil. 32 G. 2. in this vol. 2. 749. Court.

8th Feb.

1759.

RULE to shew CAUSE.

Mr. *Poole*, on behalf of the Prosecutor, now shewed Cause against the Issuing of a Procedendo.

He cited *Hawk. P. C. lib. 2 p. 287. § 25, 27, 28.* to shew, that the Prosecutor has a Right (though perhaps the Defendant may not,) to a Certiorari to remove any Indictment taken in Wales, for a Crime not Capital ; either at the Grand Sessions, or at a Sessions of the Peace.

The

The Case of *Cardiffe Bridge*, in 1 Lord Raym. 580. and 1 Salk. 146. is an express Determination in Point "that a Certiorari does lie to the Justices of Peace in Wales, passing over the Grand Sessions *per Saltum*; and that it is the constant Practice to grant them."

This Certiorari is *filed*; and the Defendants have *not appeared*: Therefore they can not apply for a Procedendo. It is a Certiorari at the Instance of the Prosecutor. The Defendants can not apply to send it back, without assigning a special Reason. Here, no special Ground is assigned: And there are only Three Defendants, out of Seven, who apply for it.

Mr. Dunning and Mr. Abberf, *contra*, for the Defendants, argued that the Court's granting a Procedendo, in such a Case as this, is *discretionary*. It is *not of Course*, for the Prosecutor to remove Indictments out of Wales, though not Capital. The Court will refuse it to him, when equal Justice can be done below.

2 Hawk. P. C. 287. "That the Court is bound to award it at the Instance of the King," only relates to the *Crown* when the King applies by his Attorney-General. The Officer of the Crown, prosecuted for the *Crown* has indeed such a Privilege: But not a common Prosecutor of an Indictment.

In a Note at the End of *Draiton and Cotterill v. Smith*, 2 Bulstr. 158. It was said by Coke Chief Justice, and agreed by the whole Court, that the Court have Power to remove Records from *Durham*: But they will not do it; "because they have Law and Pleadings there, as this Court has here." The same Reason holds here. The Grand Sessions in Wales have the same Power in Wales, as this Court has here: * They ought to have gone thither first. They can not come hither *per Saltum*, without laying a special Ground. Whereas this Indictment came hither *as of Course*: and 34 & 35 H. 8. c. And there is Nothing particular in the Case. 'Tis a simple Indictment for not repairing a Highway: And the Certiorari to remove it hither would not have been granted, if the Court had been apprized what it was. This Removal up to this Court is oppressive and vexatious: For, it might just as well be tried in Wales, either at the Quarter Sessions, or at the Grand Sessions, as here.

As to the Return to the Certiorari being *filed*; and our not having *appeared* to the Indictment—We could not hinder their *filings*. They could do that, without our having an Opportunity to object to it: It is of Course. And the Reason

* Vide 27 H. 8. c. 26.

son we did not appear to the Indictment, was the Apprehension of our being thereby precluded from making this Motion.

They desired to have it understood, that their Motion was not grounded on the Want of *Power* in this Court "to grant such a Certiorari," but upon the Ground of *Discretion*.

Lord MANSFIELD—This is a Certiorari to the Quarter Sessions of a *Welch County*, to remove an Indictment against Eight or Nine Persons for not repairing a Highway; which it charges them with being bound to repair *ratione tenuræ*.

I believe there is a Distinction, (and it has been attended to lately,) between an Indictment only in the *Name* of the Crown, (as all Indictments *must* be;) and an Indictment actually prosecuted by the Officer of the Crown. In the latter Case, the King has undoubtedly a Right to prosecute

*The Name of it was The King against One- Tindall and Charge upon them by the Officers of Excise: And it was Others: And holden "That the King had a Right in every Case where it was in "the Crown is concerned, to demand a Certiorari; and Easter Term 27 G. 2. His Lordship was then himself Attorney-General, and made the Motion.

† The Name of this Case was The King against Deborah Burges. It was in the very same Easter Term 27 G. 2. He declared that he made the Motion by special Order from the King, (who was desirous that the Right should be solemnly tried.)

Therefore in *such* Cases, the Court will exercise *no* Discretion.

But where the Matter is really prosecuted only by a *private* Person, (which private Person is under the Control of the Attorney-General, who may stop the Prosecution,) there is a Distinction.

In the Case of an Application on the Part of the Prosecutor, for a Certiorari; it goes of Course: In Cases of Application by the Defendant, there must be a *special Ground laid*, in order to remove it from *Wales*, or from *any Jurisdiction whatsoever*.

This Certiorari is moved for by the Prosecutor. What Ground is shewn " why he should not have it?" None.

This is not a Dispute between the Grand Sessions and this Court, about Jurisdiction.

Here are Eight or Nine Defendants concerned in a Question about repairing a Highway, *ratione tenure*. I don't know how many Cousins these Eight or Nine Defendants may have at the Quarter Sessions in Wales.

Mr Justice YATES concurred.

The Crown has a Right, in general, to a Certiorari: And no sufficient Reason is shewn why the Prosecutor ought not to have it, in the Case now before the Court.

Besides, as this Certiorari is *filed*, the proper previous Motion to this Motion for a Procedendo, would have been "*to take the Certiorari off from the File:*" For, you can't move for a Procedendo whilst it is upon the File here.

But the Prosecutor has a Right to remove his Indictment, unless some Ground be laid before the Court, to the Contrary.

Mr. Justice ASTON—The King has a Right to choose his Court: But the Court will not remove Indictments from the GRAND Sessions at the Application of a * Defendant,* In a Case of Rex v. Owen Parry without Grounds.

and Gainor Thomas, (never determined) where Mr. Justice Aston moved for a Procedendo, Mr. Justice Wilmot said (on Saturday 5th May 1759) that he had looked into the Case of Theodore Morris, reported in 1 Ventris 146, and 2 Keble 724, 729. And that it appeared by the Rule-Book, that the Certiorari did not issue at the Application of the Defendant, but at the Instance of the Prosecutor.

In the Case of Berwick, (*Rex v. Cowle*) a Case was cited of Trin. 12 G. 1. B. R. *Rex v. Lewis*; where the Defendant moved for a Certiorari to remove an Indictment for a Misdemeanour, from the Grand Sessions of Anglesea: And it was granted, upon producing an Affidavit, inducing a Suspicion "that a fair Trial could not be had in Wales." [Vide ante, vol. 2. p. 861, 862. and 1 Strange, 704.]

In the Case of *Rex v. Berkeley and Bragg*, on the Glass Act*, in Lord Chief Justice Ryder's Time, The Court were clear in Opinion "that the Words in 2 Hawk. P. C. 287. sect. 27. related merely to the Crown."

* He meant Rex v. One-siphorum Tindall et al. For, Norborne Berkeley and Charles Bragg made that Order.

The

The true Distinction is, that where the *Prosecutor* moves for it, it goes of Course: But the *Defendant* must shew a *special Ground*, to obtain it, or to remove the Record back again by *Procedendo*.

Mr. Justice WILLES was of the same Opinion with Lord Mansfield and the Two other Judges.

THE RULE "to shew Cause why there should not be a
" Procedendo," was DISCHARGED.

Wednesday
14th June
1769.

Couch, qui tam &c. *versus* Jeffries.

THIS was an Action for the Penalty of not paying the Stamp-Duty upon an Indenture of Apprenticeship. Upon the Trial a Verdict was given for the Plaintiff.

On Saturday last, (the 10th Instant,) Mr. Ashurst moved on behalf of the Defendant, that the Plaintiff might shew Cause why he should not be restrained from entering up his Judgment; The Defendant having, since the obtaining the Verdict in this Cause, and before the 1st of September 1769, paid the Duties upon the Sum omitted to be inserted in the Indentures of Apprenticeship, to the Stamp-Office, pursuant to an Act of the last Sessions †, which discharges Persons who have incurred any Penalties, by such Omissions, of and from the said Penalties, upon their paying the Duty on or before the 1st of September 1769.

† 9 C. 3 c.
37. § 4.

RULE TO SHEW CAUSE.

Mr. Serjeant Davy and Mr. Mansfield now shewed Cause. The Act says, "that if the Duty before neglected to be paid shall be paid in on or before the 1st of September 1769; and the Indentures be tendered to be stamp'd, any Time before the 29th of the same Month; the Person who has incurred the Penalty by the Omission shall be discharged of and from the said Penalties."

This Verdict was obtained, upon an Action brought and tried before the making of the Act.

The Question is, "Whether this Act shall relate to Actions commenced before the first Day of the Sessions in which it passed."

They argued, that it did not. The Right is vested in the Plaintiff: The Act extends only to Actions to be brought in

in future. 2 Inst. 292. applies fully to the present Case:
 “ *nova Constitutio futuris formam imponere debet, non præteri-*
 “ *tis.*”

There was a Case soon after the Statute made for preventing of Frauds and Perjuries,* which enacts “ that from and after 24 June 1677, no Action shall be brought whereby *Vide 29 Car. 2. c. 3. § 4.
 “ to charge any Person upon an Agreement made upon Consideration of Marriage, unless such Agreement, or some Memorandum or Note, thereof, shall be in Writing,
 “ &c.” That Promise was made before the Day specified in the Act: The Action was not brought till after it. The Court held “ That the Act could not have a Retrospect to take away an Action to which the Plaintiff was before entitled.” The Name of that Case was *Gilmore v. Shuter*: and it is reported in 2 Show. 16. 2 Mod. 310. 2 Lev. 227. 1 Ventr. 330. and *Sir Thomas Jones* 108. It was holden, “ that the Statute extended only to Promises made after the 24th of June.”

In the present Case, there was a Right vested by the Legislature; which vested Right shall not be taken away from an innocent Man, in Favour of an Offender.

An Act of Parliament shall never be so construed as to do an Injustice. *Sir Francis Barrington's Case*, 8 Rep. 136. b.

Note. Lord MANSFIELD put a Question, What was the Meaning of the Words inserted in a Parenthesis in this 4th Clause of the Act—“ (of which timely Notice is to be given in the London Gazette) ?” †

¶ The Words are

“ Upon Payment &c, and tendering the Indentures &c, to be stamped, at the same Time, or at any Time on or before 29th September 1769, (of which timely Notice is to be given in the London Gazette,) the same Indentures &c, shall be good and available &c.”

Mr. *Ashurst*, on behalf of the Defendant, would have had it understood of Notice given by the Commissioners.

Mr. Justice YATES and the Two Judges seemed to come into that Construction.

But Lord MANSFIELD understood it of Notice given by the Delinquent. And Mr. Justice ASTON afterwards said, it meant public Notice, in order to make the Indenture capable of being given in Evidence.

Mr. *Ashurst*—The Commissioners of Stamp-Duties have published a Notice in the *Gazette*, ‡ to all Persons who had omitted to pay the several Rates and Duties, “ That upon Payment of the same on or before 1st September then next 1769, and following, the Two

† See Gazette, No. 10942, from 23 to 27 May 1769.

" following, the Indenture should be good and valid, and
 " the Person offending be excused from any Penalty incur-
 " red by the Omission."

The Reason, he said, of inserting this Clause in the Act, was because the Act related to so many different Subjects, that it might be easily overlooked, and remain unknown to many Persons. And so it has been understood at the Stamp-Office.

This Act has no Proviso to save Actions already commenced: And therefore it extends to such Actions. The Court will not add such a Proviso, when the Legislature have omitted it. The Words are very strong—" That the Person " paying the Duty &c, &c, shall be *acquitted and discharged* " of and from the *said Penalties.*"

Gilmore's Case was plain and clear, upon the Words of that Act of Parliament of 29 C. 2.

And Sir *Francis Barrington's Case* is not, in its Principles, contrary to my Construction.

We may take Advantage of this Matter now, as well as by a Plea after the last Continuance.

All the former Acts have had Provisoes in them, to save Actions already brought. As this has no such Proviso, they are not saved.

Lord *MANSFIELD* observed, that Mr. *Abburft's* Argument would equally prove, " That if Judgment had been signed upon this Verdict, and Execution taken out; and the Duty afterwards paid in to the Stamp-Office, pursuant to the Directions of this Act; the Money levied ought to be refunded."

Here is a *Right vested*: And it is not to be imagined that the Legislature could by *general Words* mean to take it away from the Person in whom it was so *legally vested*, and who had been at a great Deal of Cost and Charge in prosecuting. They certainly meant *future Actions*. Otherwise, it would be punishing the Innocent instead of the Guilty. It can never be the true Construction of this Act, to take away this *vested Right*, and punish the innocent Pursuer of it with *Costs*.

Mr. Justice *YATES* clearly concurred with Lord *MANSFIELD*.

The Title of the Act is—" for allowing further Time for paying Duties omitted to be paid upon Contracts with Clerks and Apprentices :" And the Words of this Clause are—

are—" that the Persons who have incurred any Penalties by
" the Omissions aforesaid, shall be acquitted and discharged
" of and from the said Penalties."

The Payment ought to be made, *so that it can be given in Evidence at the Trial.* It was meant to bar all *future Actions* to be commenced *after* the Duty had been *paid* pursuant to this Act; and upon the Trial whereof, such Payment could be given in Evidence. But it would be very strange, if we should make a Construction with a Retrospect, to *punish an innocent Man, in Favour of an Offender.*

I am of Opinion, that the Defendant could not have helped himself by a Plea after the last Continuance. For, the Act of Parliament means that the omitted Duty should be paid, *so that the Payment of it may be given in Evidence at the Trial of the Cause.*

Mr. Justice ASTON and Mr. Justice WILLES concurred. They repeated and adopted the Reasons already rehearsed; and were clearly of Opinion, that this Act of Parliament does not extend to Actions that had been brought prior to the making of it.

Lord MANSFIELD—Therefore the Verdict ought to stand : And the Rule must be discharged.

RULE DISCHARGED.

Michaelmas Term

10 Geo. 3. B. R. 1769.

Tuesday
14th Nov.
1769.

John Sliby *versus* Penhallow Cuming Esq.

THIS was an Action of Debt on the Statute of 2 G. 2.
c. 24. intitled "An Act for the more effectual preventing Bribery and Corruption in the Elections of Members to serve in Parliament;" And the Defendant pleaded "Nil debet."

It was tried at the last Assizes holden at *Padmin*, for the County of *Cornwall*: When a Verdict was found for the Plaintiff, on the 5th, 7th, 9th, 11th and 13th Counts, in the Penalties of 2500*l.* subject to the Opinion of the Court on the following Case.

CASE—The Defendant proved a Copy of a Judgment in the Court of Common Pleas, of *Hilary Term 9 Geo. 3.* between the said *Penhallow Cuming Esq.* Plaintiff, and the said *John Sliby*, Defendant: By which, it appears "that the Defendant was convicted for bribing *Richard Beard* and *John Crews.*" He also proved a *Capias ad respondendum*, issued in the same Cause on the 20th of *December 1768*, tested *28th November 1768.*

The said *Richard Beard* gave Evidence, that he was a Witness for the Plaintiff in the *said Cause Cuming against Sliby*; and proved at the Trial "that *Sliby* gave him Three Guineas for his Vote;" and further gave Evidence, in *this Cause*, "that said *Cuming's Servant* came to him in *January last*, and desired him to come to his *Master's House*: That before the said Time, he had made no Discovery of the Bribery. That *Mr. Philips*, an Attorney, examined him about it; and he made an *Affidavit of the said Bribery*: But he did not then see *Mr. Cuming*."

Nicholas Philips gave Evidence, "that he was a Commissioner for taking Affidavits, both in the Court of Common Pleas and King's Bench. That in *January last*, he received " a Letter

" a Letter from Mr. Cuming, desiring him to come to his House: And he went accordingly. That Mr. Cuming then desired him to take the *Affidavits* of several Persons, and (amongst the Rest) of said Richard Beard and John Crews, with regard to the Bribery Money distributed by Sibly to the Voters of Tregony at the last Election. That he accordingly took the said *Affidavits*, for the Purpose, as he believes, of settling the Declaration in the said Cause, Cuming against Sibly."

QUESTION—“Whether CUMING is a DISCOVERER under the ACT of Parliament; so as to be discharged from the Penalties and Disabilities incurred by the Offences mentioned in the Declaration in this Cause?”

Mr. Serjeant Burland, on behalf of the Plaintiff, objected —
1st, That this Matter ought not to have been admitted to be given in Evidence: It ought to have been pleaded. 2dly, That the Defendant was not the Discoverer.

First—This Demand being grounded on an ACT of Parliament; and an *Excuse* made in *Discharge* of the Demand; it ought to have been specially set forth in *Pleading*; that the Court might judge of it. *Co. Litt. 282. Hob. 296.*

It is not proper for the *Jury* to judge of; especially, when it is Matter of Record.

In *Co. Litt. 303.* The Distinction is taken between Matter of *Substance*, and Matter of *Inducement*; as to the Manner of alledging and answering it. Special and substantial Matter must be specially answered.

And the Case of *Waites v. Briggs*, in *2 Salk. 565*, recognizes that Distinction. [See also *5 Mod. 8, 9. S. C.*]

Upon *Nil debet*, any Thing may be given in Evidence to shew that he was discharged of the Debt, unless it be a *collateral* Matter. But here, it is a *collateral* Matter. And he compared it to the Case of a former Judgment and Recovery for the same Offence; which can not be given in Evidence, but must be *pleaded*.

The Case of *Bredon, qui tam, v. Harman*, *1 Strange 701.* where a Record of a former Recovery was denied to be received in Evidence, he said, was exactly similar to the present Case. *Eyre*, Chief Justice, held, that it ought to have been pleaded: And then the Plaintiff might have replied “*Nul tel Record,*” or that it was obtained by Fraud. This Indemnity

nity (which is a *collateral Matter of Record*) ought for the same Reason, to have been pleaded.

^{† Vide ante, page 2283} This Case differs from the Case of *Sutton v. Bishop* †, and ^{In C. B. Temp. Ld.} from *Gardiner v. Horne* ‡. For, in those Cases, the Indemnity could not have been pleaded: But here, the Indemnity is completed by Judgment before the Action was brought.

Chief Justice Willes; This Method of giving it in Evidence would be an Evasion tried before of the Statute of 4 Ann. c. 16. s. 7. which excepts Penal Statutes. So, on 21 J. 1. c. 4. there would have been no Need of the Exceptions in the fifth Section of it. This Act has been construed to extend only to former Acts of Parliament, and not to subsequent Ones: Therefore I only use it as an Argument "That before that Act, it must have been pleaded."

He concluded this First Point with observing that a Plea of *Nil debet* differs from the general Issue of *Non assumpsit*: In which Case, any Thing that shews a Discharge from the Demand may be given in Evidence.

SECOND POINT—Whether (even supposing that it might be given in Evidence) this Evidence shews "That *Cuming* was the Discoverer."

It is not such *conclusive* Evidence, as to preclude the Jury from exercising their Judgment "Whether he was or was not the Discoverer."

There can not be two first Discoverers of the same Offence.

It depends upon the Circumstances; "Which of these Two was the Discoverer;" *Cuming*, the Plaintiff, in that Action; or *Beard*, the Witness.

Here, the Affidavit was made, to found the Declaration upon. And the Discovery had not been made before *Beard's* Affidavit: Therefore he must have been the Discoverer.

Though *Cuming* sent his Servant for *Beard*, it does not follow from thence "That *Cuming* was the Discoverer."

Therefore he prayed that the *Poofea* might be delivered to the Plaintiff.

Mr. Mansfield, *Contra*, for the Defendant, argued—*1st*, That the Defendant was at Liberty to give this Evidence up-
on

on the Plea of *Nil debet*: And 2dly, That the Evidence proves the Defendant to be the Discoverer.

FIRST—He agreed to the Serjeant's Principles, “ That where the Defendant would introduce into his Defence any collateral Matter which does not deny the Charge in the Declaration, he must plead it.”

The Declaration will always shew what the Defendant may give in Evidence upon the general Issue.

The Judges have been more liberal, of late Years, in admitting Matters to be given in Evidence on *Non assumpſit*: But the old Rules were the same, in *Non assumpſit* and on *Nil debet*. 2 Roll's Abr. 682, 683. Tide “ Trial,” Evidence E. F.

This does not depend upon the old Rules of Pleading only: For, the Act of 21 J. 1 c. 4. extends to Actions upon subsequent Statutes. [Which Lord MANSFIELD denied.] The Point, he said, was not before the Court, in the Two Cases (of *Gault* and *Hicks*) in 1 Salk. 372 and 373: and 2 Hawk. P. C. 270. 278. considers the Words of that Statute as general Words: And they are so. And as to Actions upon Penal Statutes, it is held as an invariable Rule “ That they must be brought in the particular County.” And if they are not, that it may be given in Evidence on *Nil debet*. Now that can be founded on no other Law than the Statute of 21 J. 1. c. 4. And if the Statute extends to subsequent Statutes as to that one Case, it must do so, as to all others.

As to 4 Ann. c. 16—It would follow from the Serjeant's Argument, “ That in Civil Cases, a Man should take Advantage of Pleading many Matters; and in Penal Cases, be confined to One only.” But see 2 Roll's Abr. 682. and many other Books; and Bro. “ General Issue,” pl. 14.

Another Act, 31 Eliz. c. 5. limits common Informers to sue within a Year. On *Nil debet* pleaded, the Defendant may give in Evidence, a Discharge by Lapse of Time; viz. that the Matter arose above a Year before the Action brought.

In the Case of *Gardiner v. Horne*, there were two cross Actions for Bribery. A. succeeded in the First: On the Second, he would have given in Evidence that Recovery, to prove him a Discoverer. Mr. Baron Smythe held “ that he might:” And the Court of Common Pleas were of the same Opinion.

SECOND POINT—Upon this Evidence, Mr. Cuming is the Discoverer, and intitled to a Discharge.

As to the Evidence being *conclusive* upon the Jury—These stated Facts are to be considered as Facts *found* by the Jury, upon a special Verdict.

Mr. Cuming has made the Discovery ; and has prosecuted to Judgment and Execution. A *Witness* may have been an involuntary One ; and not have wished to convict : But the Prosecutor certainly wished to convict. It was not necessary to state *why* Mr. Cuming sent for Beard : But here it appears that it was in order to convict Sibly. The Time of bringing the Action shews that Mr. Cuming was the Discoverer : And no other Discoverer is stated upon the Case.

Mr. Serjeant Burland, in Reply.

As to the first Point—The Declaration does not sufficiently shew what the Plea must be.

“ *Nil debet*,” denies the Plaintiff’s Demand : But it does not shew that it was discharged by a collateral Matter. Nor can such a Discharge be given in Evidence.

The Act of 21 J. 1. c. 4. does not extend to Offences since created, nor to Actions given by subsequent Statutes. 1 *Salk.*

372. *Rex. v. Gaul*; and S. C. in 12 Mod. 223. *The King v. Gall.* 1 *Salk.* 373. *Hicks’s Case*; and 5 *Mod.* 425. + And

+ It is there stiled “*Ano-* all the Clauses of it are within the same Rule and Reason, “*nymous* ;”

But it is, most mani- The Reason of laying the Action in the County where the festly, Matter arises, is because they are local Actions, and the *Hicks’s* County. *Venue* must come from the Hundred. Therefore the Judges have holden, that proper Actions must be brought in the *Cafe.*

Where the Act of Parliament fixes a particular Time, the Defendant may give the Discharge in Evidence ; because he is not liable to a Prosecution under that Act ; he is not the Object of the Act : But here, he is the Object of the Act, unless discharged by the collateral Matter.

As to the Case of *Gardiner v. Horne*—The Defendant could not plead it, at the Time. Here, the Judgment is complete : And there was no Impediment against pleading it.

In the *Reading* Cases, The Recovery was pleaded as *puis darreine Continuance*.

As

As to the SECOND POINT—This Witness was not unwillingly drawn in to give the Evidence : He *voluntarily* made the Affidavit.

The Writ which the Plaintiff brought was only a *Quare clausum fregit*: Upon which, the Plaintiff might have declared for any other Matter. Therefore it was not the Commencement of this Suit, in particular ; but only of a Suit, in general.

LORD MANSFIELD—I give no Opinion now, on the first Point. But on the second—It does not follow that the Prosecutor must be the Discoverer : He sets up another Person to bring the Action. The Act of Parliament meant to turn the Actors of Bribery against each other. The Man that tells it, is the Discoverer : The Plaintiff in the Action brought in the Common Pleas by *Cuming v. Sibly*, was only the Person who advised or persuaded the other to discover.

In the Case of *Sutton v. Bishop*, the † Witness (*Bishop*) was + Vide ante, the Discoverer. So here, Beard was the Discoverer. page 2284,
2286.

But if it be considered as doubtful upon the Evidence “Who was the Discoverer ;” the Jury have found it against *Cuming*.

Mr. Justice YATES, as to the first Point, gave no determinate Opinion. Yet he inclined to think with Mr. Mansfield ; though he professed to give only his present Sentiments.

He was not satisfied that this was Matter of Substance, necessary to be specially pleaded. It seemed to him rather Matter of Inducement. And where it is Matter of Inducement, it may be given in Evidence, upon the general Issue ; though not where it is Matter of Substance. Now this seemed, he said, to be more of the Nature of Inducement. He thought, the Defendant was no Object of this Law.

He said, a *Proviso* in the same Act of Parliament, and the Matter provided in it, may be given in Evidence, on the general Issue.

And he specified the Case of an Action against a Parson for merchandizing, contrary to 21 H. 8. c. 13. which has a Proviso for the Necessaries to maintain his Household.

Now here is a Proviso in this Act of 2 G. 2. which, in † Vide post. Effect says, That a Person who has been a Discoverer shall not + and vide be an Object of this Law. † The Defendant has pleaded ante, page “Nil 2284 the very Words of it.

^{† Vide ante, page 2286.} "Nil debet." The Judgment will relate back † to the Time of the Discovery. The Defendant maintains the Issue, by shewing that he does not owe the Money. I think, the Discoverer is not an Object of the Act.

As to the SECOND POINT—He held that the Defendant can not here be considered as the *Discoverer*. He has indeed shewn "That he was not; but that Beard was: For, he could not have known what the Fact was, unless BEARD had discovered it."

Mr. Justice ASTON—If it had been a *distinct* Act of Parliament, it ought to have been pleaded: But here is a *substantive* Clause (in Nature indeed of a Proviso) for Indemnity, in the *same* Act of Parliament. And if this had been pleaded, it would not have been sufficient: For, it would not have appeared upon the Plea, "That he was the Discoverer."

BEARD was clearly the Discoverer; And he was the Person intitled to the Exemption. Therefore the Plea would not have been sufficient: because it would not have shewn that the Defendant was thereby exempted,

Mr. Justice WILLES, who tried the Cause, attested that the Case meant to consider the Facts, in the same Manner as if they had been specially found.

He gave no Opinion upon the first Point.

As to the Second, he was clear in concurring with the Rest of the Court.

BEARD was certainly the *first* Discoverer; and ought to have the Benefit of it. The Defendant is not intitled to the Benefit of the Exemption.

LORD MANSFIELD now said, (upon the first Point) that he thought this Matter might be given in Evidence,

Per Cur'.

POSTER to be delivered to the PLAINTIFF.

Davy *versus* Baker.Monday
20th Nov.
1769.

THIS was an Action upon the Statute of 2 G. 2 c. 24. for the more effectual preventing Bribery and Corruption in the Election of Members to serve in Parliament : The 7th Section whereof enacts that if any Person should ask, receive, or take any Money or other Reward, he shall forfeit 500l. and be disabled to vote at any Election.

This was at an Election for *Bramber* in *Suffex*.

Upon *Nil debet* being pleaded, a Verdict was found for the Plaintiff.

On *Tuesday* the 7th of this Month, Mr. *Wallace* moved in Arrest of Judgment. His objection was that the Charge was too loose and general : It is only " that the Defendant did " receive a *Gift or Reward* ;" without specifying *what* he received or took, as a Reward ; whether *Money*, or what particular Species of Reward.

Mr. *Dunning*, Mr. *Serjeant Leigh* and Mr. *Davenport* now shewed Cause, on behalf of the Plaintiff. They said that this, though general, was sufficient *after a Verdict* ; whatever it might have been upon a Demurrer for a special Cause. For, a Pleading which upon Demurrer would be bad, for its being too general, may nevertheless be sufficient after a Verdict. And so was the Case in 1 Mod. 70. *Caterall v. Marshall*. 2 Keb. 692. S. C.

The Declaration is in the *very Words* of the Act of Parliament. And the Charge is found by the Jury to be true, " That he did receive a Gift or Reward ;" and is therefore within the Act.

Mr. *Wallace contra*. All that the Declaration says is — " that he took a Gift or Reward, to give his Vote :" Which is in the Disjunctive. *Cq. Litt. 303.* and *Long's Cafe*, 5 Co. 120.

The Defendant could have no Notice, to make his Defence.

He likewise cited 2 *Strange* 999. *Rex v. Robe* : Where the Judgment was arrested, because the Charge was so *general*, that it was impossible any Man could prepare to defend himself upon that Prosecution, or have the Benefit of pleading it in Bar to any other.

Lord

Lord MANSFIELD—This Declaration is bad: And being upon a Criminal Charge, It ought to have been laid with Certainty. The being after a Verdict makes no Difference. It may be taken Advantage of, in Arrest of Judgment: It is not too late.

Mr. Justice YATES—The Declaration is clearly bad. It ought to have been laid with sufficient Certainty, so as to be pleadable in Bar of another Action. Criminal Charges must be laid with Certainty: And if they are not, Exception may be taken, in Arrest of Judgment, after a Verdict. The Case of Extortion, cited by Mr. Wallace, is in Point.

Mr. Justice ASTON and Mr. Justice WILLES were silent.

JUDGMENT ARRESTED.

Tuesday
21st Nov.
1769.

Vertue *versus* Lord Clive.

THIS was a Case of the same Kind with that of Captain Parker against Lord Clive in Easter Term last; reported *ante*, p. 2419. The Difference between the two Cases was only this. Captain Parker's turned upon the *general abstract* Question, “Whether a Military Officer in the Service of the “*East-India Company* has a Right to resign his Commission at “all Times and under *any Circumstances*, whenever he pleads:” The present Case turned upon the *particular Circumstances* under which Captain *Vertue* stood, at the Time when he resigned his Commission.

It came before the Court, upon a Motion for a new Trial in an Action for an Assault and false Imprisonment in *India*; in which, the Jury had found for the Defendant.

Mr. Dunning (Solicitor-General) argued on behalf of the Plaintiff Mr. *Vertue*, for a new Trial.

He denied that Mr. *Vertue* was in a *Military Character*, or in a Capacity to commit a *Military Offence*, at the Time when this Military Jurisdiction was exercised upon him by the Defendant.

The Commission which Mr. *Vertue* had received contained no Engagement or Obligation upon the Company, to keep him in their Service a Moment longer than *they* liked; nor upon him, to continue in their Service longer than *he* liked: Either party were at their Liberty to put an End to the Contract, under *proper Circumstances* and in a *proper Situation*. And these

these were proper Circumstances, and a proper Situation. The Reduction of the Battalions, which had been allowed to the Predecessors of these Officers, took away from them what induced them to enter into the Company's Service : And the Enemy had been defeated, before the Plaintiff resigned his Commission. The Question depends, therefore, upon the *actual* Circumstances the Plaintiff was under at the Time of his Resignation.

Their common Soldiers stipulate for Five Years certain. Their Officers did not, at that Time, stipulate for any limited Time : And therefore, as the Company could at *any* Time turn off their Officers, They on the other Hand ought to be at Liberty to quit at *any* Time, under *proper* Circumstances.

The Company were used to *advance* a Month's Pay. The Officer could not, therefore, quit *within* that Month. But at the *End* of it, he was just in the same Case as the common Soldier was at the End of his Five Years. Now Captain *Vertue* had *not* received, but on the contrary *declined* to receive the Month's Pay in Advance : And therefore he could be under no Engagement or Obligation to continue in their Service, upon *that* Account.

If he had a *Right to resign*, it is quite immaterial whether Colonel *Smith* accepted, or refused to accept his Resignation.

And Captain *Vertue* acted by or for himself, upon his own Grounds and Reasons ; not in Concert or *Combination* with any other Person.

He quitted the Camp upon the 8th of *May* ; unconnected with any other Person, and upon a recent personal Affront. He was neither concerned in or even charged with being concerned in any *Combination* with any other Person whomsoever.

At the *Time* when he quitted the Camp, he was not under the Command of Colonel *Smith* : And therefore he could not be affected by Colonel *Smith*'s forbidding him to quit it.

He was *improperly* brought before the *Military Jurisdiction*.

Mr. *Cox* and Mr. *Walker* were *on* the same Side ; but left it upon what Mr. *Dunning* had urged.

Mr. *Thurlow* was beginning to speak on the Side of the Defendant, and in Support of the Verdict : But he was stopt by Lord *MANSFIELD*, who told him it was unnecessary for him to proceed.

His LORDSHIP, who tried the Cause, then gave the following Account of the Trial and Evidence.

This is an Action brought against Lord Clive, who approved the Sentence of the Court Martial; but was not privy to any Thing previous to the Court Martial, or to any Thing done at it.

At the Trial, the Question was "Whether Mr. *Vertue* was an Object of Military Law, at the Time of holding the Court Martial upon him."

If he was not, every Thing done at it, in Relation to him, was void; and Lord Clive had no right to hold it upon him.

There were other Actions brought against Lord Clive. In that which was brought by Captain Parker, the Court were of Opinion "that their Officers had not a Right to resign at all Times and under any Circumstances, whenever they pleased." They very rightly guarded against laying down the absolute Proposition. The Right to resign must depend upon the particular Circumstances of each particular Case. The Question in Captain Parker's Case is not the Question in this Case: Captain Parker was tried for Mutiny in the Service. All arises from the Nature of the Service. There is no Engagement or Contract with the Officers, for any particular limited Time. The only Question at this Trial was "Whether Mr. *Vertue*, the present Plaintiff, was in his Military Capacity, at the Time when he disobeyed Colonel Smith's Orders and quitted the Camp."

When Lord Clive was in India before, the Officers had double Battas. The Company were dissatisfied with the Continuation of double Battas; and sent Orders to India, against continuing it: But Mr. *Tanjittar* did not think it seasonable at that Time, to reduce it. The Company afterwards peremptorily ordered it to be reduced to a single Batta. Lord Clive put their peremptory Order into peremptory Execution. The Officers under the Degree of Field Officers, were dissatisfied at this Reduction. The Black Troops (the Seapoys) were commanded by European Officers. The Marattas were then in Motion. Some said, they were only collecting their Taxes; others supposed them to be dangerous. The Company's Troops were in three Brigades. The Officers of each Brigade combined together, to throw up their Commissions; and All of them, above 200 in Number, to resign at the same Time. The Plaintiff Mr. *Vertue*, a Lieutenant of Seapoys, was One of those who thus combined. Many of the Subaltern Officers, of whom the Plaintiff was one, wrote Letters,

on the 6th of May, to Colonel *Smith*, desiring *Liberty to resign at the End of their Month*. He issued a very severe Re-fentment of their Behaviour. Others, who desired Leave to *resign immediately*, were ordered by Colonel *Smith*, to *Calcutta*: And he declared that the Rest should have an Answer before the End of the Month.

If they were used ill by Colonel *Smith*, That would not justify them in *resigning*: They should have complained to the President and Council.

Lieutenant *Vertue* was not affected by Colonel *Smith's* sending the Subaltern Officers who desired Leave to resign *immediately*, to *Calcutta*. Yet, on the 7th of *May*, he went to Colonel *Smith*, and complained of the Orders, and offered to resign. Colonel *Smith* refused to accept his Resignation; and commanded him to stay in the Camp. *Vertue* left his Commission on Colonel *Smith's* Table; and, the next Morning, went away from the Camp, in the Sight of the Commanding Officers and of the Men under Arms. Whereupon, Colonel *Smith* ordered him to be arrested: And he was arrested accordingly; and afterwards tried by a Court Martial, and ignominiously broken.

The Question I left to the Jury, was, "Whether under "these Circumstances he had a Right to quit the Camp, as "being then out of his Military Capacity."

There was no Evidence that Colonel *Smith* had any Right to *take* the Resignation of the Subaltern Officers: And he had refused to *take* it; saying, "that he would give an Answer "before the End of the Month,"

Lieutenant *Vertue* could not *resign before* the End of the Month; because the advanced Month's pay had been paid to the Agent of these Troops, by the Paymaster, upon the 28th of April, to be distributed amongst the Officers as usual; and there was Evidence that Mr. *Vertue* was *mustered* on the 1st of May: And on the 6th of *May*, he wrote a Letter to Colonel *Smith*, signed as Lieutenant, and again another, on the 7th, *owning himself a Lieutenant*. Consequently, he was so, on the 8th in the Morning.

But the great Ground is the COMBINATION amongst the Officers, to throw up their Commissions, in order to *force* the Company into allowing them the double Battal. The very Measure shews that it was meant to *terrify and intimidate* the Company into an Allowance of it. And the Danger of such a Combination, and of all these Officers quitting the Service at once, is too obvious to be denied or doubted.

There

'There must, at the least, have been great Danger of an Insurrection amongst the Seapoys and Common Soldiers, though there might not have been any from the Marattas.'

The Jury was a special Jury; and they brought in their Verdict for the Defendant: And I think there is no Ground for a new Trial.

Mr. Justice YATES—In Captain Parker's Case, We were clear in the abstract Opinion, "that these Officers can't resign at *all* Times and under *any* Circumstances, whenever they please."

As to their being bound for Life, by their Contract—I freely declare my Opinion "that they are *not*."

But though no particular Period is fixed, and though they are not bound for Life, it does not, however, follow "that they are at Liberty to quit under *all* Circumstances whatsoever."

Here, Lieutenant *Vertue* was in the Service and under his Contract, at the Time when he quitted. He had received the advanced Pay; and was mustered on the 1st of May: and on the 6th demanded Permission to resign, and actually quitted, on the 8th. He ought to have given sufficient Notice, to prevent the advanced Pay and his being mustered. He signed himself "Lieutenant," on the 6th; and acknowledged his being so, on the 7th.

This Combination being a criminal Act, it could not be a legal Determination of the Service.

Upon the Whole, there is no sufficient Reason for a new Trial.

Mr. Justice ASTON—The Plaintiff's own Letter shews "that he himself did not think he was at Liberty to resign, without Permission from his superior Officer." And if every Thing else that he claims was to be admitted to him, yet there is no Pretence to say that he could be at Liberty to resign before the Expiration of the Month for which the Agent had received his advanced Pay. He had acknowledged himself to be a Lieutenant upon the 6th, and also upon the 7th: And his Letter imports his agreeing to continue so till the End of his Month.

There is no Reason for the Court's granting a new Trial.

Mr.

Mr. Justice WILLES concurred; being of the same Opinion with the other Judges, "that this Gentleman was an Officer in the Service, at the Time when he quitted it."

Pér Cur'. unanimously—

RULE DISCHARGED.

Martin and Others, Assignees of Edward Robarts, a Bankrupt, *v.* Thomas Pewtress and Josiah Robarts.

THIS was an Action of *Trover* brought by the Assignees of a Bankrupt, for large Quantities of Goods of the Bankrupt, to the amount of 19,562l. 17s. 8d.

The Cause was tried before LORD MANSFIELD, by a special Jury, at *Guildhall*, at the Sittings after the last *Trinity* Term: And a Verdict was given for the Plaintiffs, for the above Sum.

The Defendants had obtained a Rule to shew Cause why, upon Payment of Costs, this Verdict should not be set aside, and a new Trial had.

Upon shewing Cause now, Lord MANSFIELD reported the Evidence.

The Defendants were Bankers, and large Creditors of the Bankrupt. *Edward Robarts*, the Bankrupt, is the Brother of the Defendant *Josiah Robarts*.

The Value of the Goods for which this Action is brought, got into the Hands of the Defendants in the following Manner. *Edward Robarts* bought Goods upon Credit, from several Tradesmen who did not suspect his Circumstances. The Defendants employed Agents to buy these Goods from the Bankrupt. Particularly, One *Nathaniel Sweet*, who had been a Bankrupt, and was then insolvent, bought, between March 1767 and June 1768, (when *Edward Robarts* became Bankrupt,) to the Amount of 7709l. at prime Cost: For which, he gave his Notes, payable at a future Day. These Notes were paid in to the Defendants: And *Sweet* sold the Goods for the Use of the Defendants, and accounted with them for the Profits, as their Agents.

The Defendants sent another Man, one *Moses Birch*, to buy Goods of the Bankrupt, to the amount of 2163l. 15s. 11d. prime Cost; and furnished him with Bank Notes to that Amount,

Amount, to pay for them. He paid these Notes to *Edward Robarts* the Bankrupt; who changed them, at the Bank, for others; which he paid in to the Defendants. *Birch* sold the Goods, for the Use of the Defendants; and paid them the Produce: And in like Manner, as to all the Rest. The Price, at prime Cost, was furnished in Paper, by the Defendants, to the Agents; received by *Edward Robarts*; and returned to the Defendants; or Notes given by the Agent, which Notes *Edward Robarts* paid in to the Defendants and discounted with them: And the Goods were all sold for the Benefit of the Defendants; and the Money accounted for, to them, by the nominal and apparent Purchasers.

This was a gross *Fraud* upon the *Creditors* of the Bankrupt; and a *Cheat*, by *Covin* and *Collusion* between him and the Defendants.

But I don't think it amounted to an *Act of Bankruptcy*; because there was no fraudulent *Deed* or *Conveyance*.

I left it to the Jury, to consider, "Whether it was a *fair Sale*, as between the Bankers and the Bankrupt; or a *Cheat*, to defraud innocent Persons from whom the Goods were bought."

This is an Action of *Trover*; in which the Plaintiffs could not recover, unless the Property was in the Bankrupt. The Jury have considered this as *no Sale*, but a *void Transaction*. Therefore it is void on both Sides: And the Bankrupt has his Goods. But the Defendants have no Right to set off the Debts, so as to have the Benefit of their Fraud.

The Bankrupt never dealt for more than 800*l.* a Year, till this Transaction. Now, his Dealings were increased to 28,000*l.* in Eighteen Months. So that his Debts, which were before only about 6000*l.* were now increased to 23,000*l.*

The Counsel for the Plaintiffs (Mr. *Thurlow*, Mr. *Serjeant Glynn*, and Mr. *Mansfield*.) argued that this was as clear a *Fraud* as could be: And therefore the Defendants ought not to have *any Advantage* from it; much less, the *whole Effect* of it. The Possession which they obtained of these Goods was tortious, criminal and unlawful. Therefore they had *no Title* to them: And this action lies; and no Equity can be pretended against it. It was a Conveyance of them without any valuable Consideration: It amounted to an *Act of Bankruptcy*. It was a Combination to give an iniquitous and illegal Priority to a particular Creditor. The *whole Transaction* was fraudulent and *wid*. It must have been in Contemplation of an approaching Bankruptcy; and tended to induce a general Belief "That this Bankrupt was engaged in an extensive

"tensive Trade ;" when, in Fact, the Goods were *not sold* at all, but sent in to One Creditor, in Preference to the Rest ; and to keep up the Bankrupt's Credit till that Creditor should be paid. *Edward Robarts* actually became Bankrupt in June 1768. The Defendants came to the possession of the Goods by Tort : The Property remained in the Bankrupt. The Sale was merely colourable : It was a *void Contract*.

Therefore they have no Right to set off the Monies advanced, as a Debt due from the Bankrupt : For, that would give them the full Effect of their Fraud.

Though the Bankrupt himself, being Party to the Fraud, could not have sustained this Action ; yet his Assignees may sustain it. All his Property is transferred to them. Therefore this Action of *Trover* lies, and it is the proper Action : And the Jury may assess Damages. No other Verdict could have been given.

The Counsel for the Defendants, who prayed a new Trial, (Mr. Dunning Solicitor-General, Mr. Serjeant Davy, Mr. Serjeant Burland, and Mr. Cox,) contended that it would not be just, that the Defendants should pay the *whole Sum* given by the Verdict ; and, on the other Hand, only come in as Creditors for *Part* of it.

They contended also, "that *Trover* is not the proper Action."

They argued, that either the *Property* of these Goods continued in the original Owners, and never vested in the Bankrupt ; (for if fraudulent, the Fraud would have affected the whole Transaction;) or else, it was transferred by him to the Defendants. In neither Case, could his Assignees, they said, maintain *Trover* for them.

In the former Case, the Original Owners were intitled to the Action : In the latter, the Bankrupt might transfer these Goods to the Defendants or to whom he pleased, either with or without Consideration, at any Time before an Act of Bankruptcy was committed. The Assignees have no right to recover them, as standing in the Place of the Bankrupt : For, the Transaction is clearly good, as against him.

If these Goods had been paid for in *Specie*, that Cash in *Specie* would have been paid into the Shop of the Defendants, just as the Notes were. So that this Circumstance makes no Difference.

The Defendants did not apprehend the Bankrupt to be *insolvent*, or in *Danger of Insolvency*, at the Time of this Transaction.

Therefore,

Therefore no Action of Trover will lie : And it is the more improper ; because there can be *no Set-off* in any Action of Trover.

LORD MANSFIELD—The two Grounds of this Motion are—*1st*, That the Jury have done wrong in finding the Transaction to be a *Fraud*: *2dly*, that supposing the Transaction to be fraudulent, yet the Plaintiffs ought to have been *non-suited*. And if that be so, a new Trial ought to be granted ; in order that they may have the Benefit of a *Non-suit*, upon a new Trial.

As to the *Fraud*—The fraudulent Design and Intention must depend upon Circumstances.

In the present Case, 'tis as clear as the Sun, that the whole was a wicked Scheme, concerted between the Defendants and the Bankrupt *Edward Robarts*, to keep up his Credit, to enable him to get Goods which were to be employed to satisfy and discharge the Debt due to the Defendants.

One of them is Brother to the Bankrupt. They must have known his Insolvency : For, to their Knowledge, the Goods were sold at prime Cost. The Bankers did not deal in such Goods. Had they bought them openly, and in their own Names, and applied the Money to sink the Debt due to them, the Neighbourhood would have been immediately alarmed. They knew that the Persons who sold their Goods upon Credit, to the Bankrupt, would never be paid.

But I did not think it amounted to an Act of Bankruptcy, for the Reason I have given ; and left it to the Jury on the Point of *Fraud* affecting and annulling the whole Transaction.

I dictated my Apprehension of the Consequences of this Verdict, in taking the Account before the Commissioners, to the following Effect.

" That, in Consequence of the Verdict, the Notes given " by *Sweet* and the other Purchasers of the Goods, and de- " livered or paid by the Bankrupt to the Defendants, are not " to be considered or imputed as any Payments at all, being " totally void. And if any Money was paid by the Defen- " dants to the Bankrupt, as in Consideration of such Goods " so fraudulently sold, such Money is received by the Bank- " rupt without any Consideration ; and therefore to the Use " of the Defendants ; and, consequently, to be set off under " the Commission."

HIS LORDSHIP held the Action of *Trover* to be maintainable. A Trader can't alter the Property of Goods, by a Criminal fraudulent Transaction, to the Prejudice of his Creditors.

Mr. Justice YATES—The general Question is “Whether an Action of *Trover* is, in this Case, maintainable.”

One Objection to it is, “That the Defendants are precluded from a Set-off.”

But this would be an Objection against *all Actions of Trover*: For, there can be no Set-off, in *any Action of Trover*.

An Action of *Trover* must be founded on *Property*.

The Question then is “Whether this Transaction altered the Property, with respect to the *Affinees*. ”

If *fraudulent*, it does not alter the Property.

The *Affinees* do not stand in the Place of the Bankrupt, in *every Respect*: Particularly, where the *Act of Bankruptcy* has been *fraudulent*.

It must be inquired therefore, “Whether this was a *Sale* and a *Transfer* of the Property.”

The Jury have considered it as *not so*: And I think they were well warranted in such their Notion of it.

It is said, “that the Bankrupt, before he had committed any *Act of Bankruptcy*, might have delivered the Goods, or paid the Money to whom he pleased.”

But here he has not done so; but has pursued a Method which is *fraudulent*, and which is calculated to cheat innocent Persons: And the Defendants were *privy* to it and *assisting* to keep up the Credit of a sinking Man, under *false Appearances*.

This can not be considered as a *Sale*. The Defendants are not Linen-Drapers; they had no Warehouses; they don't even appear in the Matter. It is a Scheme to save themselves, and to cheat innocent Persons—a *fraudulent Design*. This Action of *Trover* is a proper Remedy to relieve the Creditors.

He therefore concurred in Opinion, with Lord MANSFIELD.

PART IV. VOL. IV.

O o

Mr.

Mr. Justice ASTON—The Question is “Whether the *Property was changed by such a Sale as this.*”

He held that it was not. And he was of Opinion, that though this was not an Act of Bankruptcy in itself; yet being a Scheme concerted, at the Eve of a Bankruptcy, to cheat innocent Persons, in order to secure particular Creditors, it is such a *Fraud* as shall render the Sale void.

Then he mentioned several Circumstances which shewed the fraudulent Combination, and the Contrivance of it in order to avoid the Appearance of an express Preference, at the Expence of innocent Persons. He said, the Jury could not have found otherwise than they have done, unless they had been out of their Senses.

The Question “Whether this Action of *Trover* lies,” depends upon the Evidence: And that shews, “That the *Property was never altered.*”

Therefore the Verdict is very Right; the Action is well brought; And it is the only Action that could be brought.

Mr. Justice WILLES concurred.

Per Cur'. unanimously—

RULE DISCHARGED.

Vigers *versus* Aldrich.

Friday 24th
Nov. 1769.

THIS was an Action of Debt upon a Judgment. It appeared upon the Plea, and was admitted by the Replication, That the Defendant's Person had been taken in Execution, by Virtue of a Capias *ad satisfaciendum*, upon this Judgment; and afterwards discharged out of Custody, by Consent of the Plaintiff, upon his entering into an Agreement “to pay certain Sums of Money at stipulated Times;” Part whereof he had accordingly paid to the Plaintiff pursuant to the said Agreement, but had failed in Payment of the remaining Part. The Plaintiff, in his Replication, acknowledged all this; and yet concluded it with demanding the whole Sum due upon the Judgment. The Defendant demurred to the Plaintiff's Replication.

Mr. Abbott, for the Defendant, argued that the Defendant having been once taken in Execution upon this Judgment, and

and afterwards discharged of the Execution against his Person, by the Consent of the Plaintiff, he could not be liable to any further Execution upon it; nor could the Plaintiff bring an Action of Debt upon the same Judgment, which had been already so carried into Execution, and the Defendant so discharged from it. He also objected to the Replication, as repugnant, in persisting to demand the whole Sum recovered by the said Judgment; though it admits Part of it to have been satisfied.

Mr. Mansfield contra, for the Plaintiff, endeavoured to answer the first and principal Objection, by putting the Plaintiff's Consent to the Defendant's Discharge, upon the Foot of a Conditional One, and entirely rescinded or annulled by Non-Performance of the Condition; and therefore, in Event, no Consent at all. As to the Fault objected to, in the Form of the Replication; he said, it might be amended. But

THE COURT were clear with Mr. Abbott in both Points.

They held this to be an absolute Consent in the Plaintiff, to discharge the Defendant out of Execution, in Consideration of a new Agreement then entered into, whereby he was to receive several Sums of Money instead of the Person of the Defendant; (which was all that he could have had, if he had kept the Defendant in Gaol;) and that he could not bring an Action upon the Judgment, after the Defendant had been taken in Execution and discharged by the Plaintiff's own Consent; but ought to have brought a new Action upon the Case, founded on this new Agreement.

Mr. Justice YATES added a strong Reason why he could not bring an Action upon the old Judgment; namely, that it was the constant Method of declaring, in an Action of Debt on a Judgment, to alledge in the Declaration, "that the Judgment still remained altogether unsatisfied."

They also held the Replication to be repugnant in demanding the whole Sum, when it acknowledged it to be satisfied in Part.

Per C. R. unanimously—

JUDGMENT for the DEFENDANT.

Richard Roe on the several Demises of Elizabeth Haldane and Thomas Urry, *versus* William Harvey.

IN Ejectment — for certain Premisses in *Newtown alias Frankville*, in the *Isle of Wight*. The Demises were laid on 6th of October 1768. The Cause was tried before Mr. Justice Aston at *Winchester*.

He reported, that the Title opened for the Plaintiff was under Mrs. *Haldane*, as Devisee of *Robert Holmes*. Two Deeds were produced, (a Lease and Release,) dated 11th and 12th of October 1731, between the said *Robert Holmes* and *John Blackford*; whereby *Holmes*, in Consideration of 20*l.* conveyed to *John Blackford* and his Assigns, *Little Starles*, since called *Rides*, in *Newtown alias Frankville*; To hold to the said *John Blackford*, for Life. *William Clark* said that he had these Deeds from the Plaintiff's Attorney: And *Richard Clark* proved "That he received the Rents of " these Premisses from *John Blackford*, for the Years 1752 " and 1753, of one *John Drake* since deceased." That *John Blackford* died in 1759: And that after this Death, this Witness received the Rents of the same Premisses for Three Years, for *Robert Blackford* the Son of *John*, as Devisee of his Father.

That in 1765, this Witness was spoken to by Mrs. *Holmes*, for Mr. *Blackford* to give up the Possession; and that *Blackford* gave up the Possession.

Then the Will of *Robert Holmes* was produced, and proved; dated 24th of January 1738. It appeared that he died the 9th of April 1751; and by his Will devised all the Rest and Residue of his Estate whatsoever and wheresoever to his Wife *Elizabeth* her Heirs Executors and Administrators.

It was proved that Mrs. *Elizabeth Holmes* married Captain *Haldane*; and that he was dead.

There was no Proof of any Receipt of Rents, since the *Blackfords*: And *William Clark*, a Witness produced for the Plaintiff, upon Cross Examination said "That Mrs. " *Haldane* had, before the 6th of October, 1768, conveyed " away her Interest in the Premisses to Mr. *Thomas Urry*, " and that the DEED was IN COURT."

Upon this, it was insisted by Mr. Serjeant *Burland* for the Defendant, " That the Plaintiff's own Witness proving the " Title

" Title out of Mrs. Haldane, and that the Deed of Conveyance to Urry was in Court, it ought to be PRODUCED in Evidence to shew a Title in Thomas Urry, the other Lessee of the Plaintiff."

The Deed's being in Court, or at least in the Plaintiff's Power, was not controverted. But, for the Plaintiff, it was insisted " That no Notice having been given by the Defendant, for the Plaintiff to produce this Deed, they were not obliged to do it. And it was also insisted, that the Plaintiff ought to recover under One or the Other of the Leases: For, upon this Evidence, if Mrs. Haldane had parted with the Title, yet Urry had it."

It was answered, " That this was not a Case which required Notice—" " That the Defendant did not claim under this Deed: It was only then disclosed by the Plaintiff's own Evidence; and to be produced, to complete his Title derived from Urry."

Under the above Circumstances, Mr. Justice Aston thought " the Plaintiff ought to give further Evidence, to ascertain the Title under which he was to recover the Term."

But the Plaintiff rested his Case; and was nonsuited; the Defendant agreeing " That the Plaintiff should be at Liberty to move for a new Trial, without Payment of Costs."

A Motion was accordingly made; a Rule to shew Cause; and Cause now shewn.

This Cause was strenuously argued at the Bar, by several eminent Counsel on both Sides.

It was urged on behalf of the Defendant, That the Deed being confessedly in Court, and in the Power of the Plaintiff, ought to have been produced by him, in order to shew that Urry had a Title. For, his own Witness (*William Clark*) had proved that no Title remained in Mrs. Haldane; she having conveyed it away: And none appeared in Urry; as they refused to produce the Deed, though actually in Court, upon which they pretended that his Title was founded. So that, instead of shewing that Urry had a Title, this Refusal to produce the Deed was a good Ground of Presumption " That in Fact he had none; and that there was some Defect in this Deed, or some Thing or other contained in it, which if it had been produced, would have shewn that he had none; and that they did not dare to produce it, because it would destroy their Title instead of proving it."

As to the Objection urged on the Part of the Plaintiff, " That the Defendant had not given the Plaintiff Notice to produce

" produce this Deed ; and therefore he was *not obliged* to " produce it ;" their Answer was, That *Notice* to produce it, was neither *requisite* nor *practicable* in the present Case : For, the Defendant could not be apprized that the Plaintiff had any such Deed ; neither did the Defendant *claim under it*. On the contrary, it was first disclosed on the cross Examination of the Plaintiff's own Witness ; and ought to be produced by him, in order to complete the Title which he claimed *under Urry* ; which Title remained, otherwise, totally *unsupported*.

On the other Hand, it was argued by the Plaintiff's Counsel, That even admitting " that there was no need of " their having had Notice to produce it," or taking it upon the same Foot as if such Notice had been actually given to them ; yet they were *not* under any *Obligation* to produce it. They laid it down as a known and established Rule of Evidence, " That though a Party had regular and full Notice to produce a Deed, the *only* Consequence of his *not* producing it, was that the adverse Party should be let in to prove the Contents of it by an *inferior Species* of " Proof; as, for instance, by reading a *Copy* of it, or by " *Parol Evidence* :" Which the Defendant had not, in the present Case, either done or attempted to do. And as to, the pretended Presumption " that there might be some Defect in " it, or something contained in it which destroyed the Validity or Effect of it," it was grounded upon mere Imagination : And so far was it from being at all probable, that on the contrary it must be presumed to convey at least an Estate for Life to Mr. *Urry* ; because the Witness (*William Clark*) had said, " that the Conveyance was made to *Urry*, in order " to qualify him to give his Vote for a Representative of the " Burrough in Parliament ;" which must therefore, be a Freehold. However, be the Presumption ever so strong, such Presumption ought to have been left to the Jury : The Plaintiff ought *not* to have been *nonsuited*.

They insisted, with great Vehemence, that instead of being *nonsuited*, the Plaintiff ought to have had a *Verdict* : For, that his Title appeared to be a good One, without the Assistance of this Deed. He had laid a *double Demise* ; one from Mrs. *Haldane*, the other from *Urry*. The Evidence given by *William Clark*, was " that Mrs. *Haldane* had had " an Interest, but had *conveyed* it to Mr. *Urry*." Therefore, most manifestly, there was an Interest remaining in ONE of the two Lessors of the Plaintiff : And it was indifferent to the Plaintiff, in *which* of the two it subsisted. If it was *out* of Mrs. *Haldane*, it was *in* Mr. *Urry* : For, *thus far* the Witness had clearly proved. And therefore they had a Right to rest the Matter here ; having claimed under two Demises, and shewn that there was a subsisting Right in the One

One or in the Other of the two Lessors. So that, either under one Demise or under the Other the Plaintiff had proved a good Title. Therefore this Nonsuit ought to be set aside; and the Cause go down to Trial again.

They urged the Propriety of adhering to the settled Rules of Evidence, and the Inconvenience which would attend the rendering those Rules again vague and fluctuating, by an unnecessary Departure from them after they had been fully established.

LORD MANSFIELD reasoned from the Nature of an Ejectment, and the Course of Proceeding upon it. He laid it down as a Position, "that in this Action, the Plaintiff can not recover, but upon the Strength of his own Title." He can not found his Claim upon the Weakness of the Defendant's Title. For, Possession gives the Defendant a Right against every Man who can not shew a good Title.

The Plaintiff here claims under a Widow who never was in the Receipt of the Rents and Profits. Robert Holmes, in October 1731, conveyed to John Blackford, for Life. Blackford died in 1759. She was Widow and Devisee of Robert Holmes, who died in April 1751: But the Rents were received for John Blackford in 1752 and 1753, and after his Death in 1759, for Three Years, for his Son Robert Blackford as Devisee of John his Father; There was no Proof of any Receipt of Rent since the Blackfords. And the Witness produced for the Plaintiff proved, upon Cross-Examination, "that she had conveyed away her Interest in the Premises, to Urry, before the 6th of October 1768;" which was the Day on which both Demises were laid to be made. So that it is plain that the Plaintiff had no Title under the Widow, Mrs. Haldane.

Then, as to his Claim of a Title under Urry, he has not proved any Title in Urry. The Jury could not have found for the Plaintiff, under the Deed of Conveyance to Urry, without producing it. And probably, there was something in the Deed, which would have shewn, that Urry had no Title.

He principally laid stress upon the Plaintiff's refusing to produce the Conveyance from Mrs. Haldane, which was in Court. The want of Notice was no Objection, in this Case; because they had the Deed in Court. The Refusal to produce it was an unfair Attempt to recover, contrary to the real Merits: And being a deliberate Refusal, by the Advice of Counsel, contrary to the Recommendation of the Judge, warranted the strongest Presumption "that the Deed would shew that neither of the Lessors of the Plaintiff had any Title."

Mr.

Mr. Justice YATES thought the Plaintiff ought to have had a Verdict. He founded himself upon the *Rules of Evidence*. Its coming out upon *Cross Examination* of the Witness makes no Difference: No more does the *Value* of the Estate. The Plaintiff's Counsel were *not obliged* to produce this Deed: No Man can be *obliged to produce Evidence against himself*. The only Consequence of *Notice* to produce it would have been "the admitting inferior Evidence." He instanced in a Case which happened before himself; when a Poll Book which *lay in Court* was refused to be produced: He held "they could *not* be obliged to produce it." And this his Determination was *acquiesced in*.

He thought the Counsel for the Plaintiff should not have suffered a Nonsuit; but should have *appeared*, and so had it *left to the Jury*, "Whether the Plaintiff had shewn a sufficient Title or not."

Mr. Justice ASTON—In an Ejectment, the Party who would *change* the Possession, must make out a Title. This was a *scambling Title*. It was a Matter of small Value, excepting its being for the Purpose of voting at the Election of Members to Parliament.

The Conveyance from *Robert Holmes* to Alderman *Blachford* was in 1731. *Blachford* died in 1759. *Holmes* died in 1751, and devised to his Widow; She married *Haldane*. Alderman *Blachford*'s Son entered as Devisee of his Father, and held it Three Years. Mrs. *Haldane* had no Title but as Devisee of *Robert Holmes*. *William Clark* the Witness said, she had conveyed to *Urry*. But the Plaintiff *shewed no Title under Urry*; which he ought to have done.

I was not called upon, to leave it to the Jury. I thought the Refusing to produce the Deed was a Want of Fairnets; and that the Plaintiff had *not* made a *complete Title*, without it.

But if there is any Doubt in the Court, I have no Objection to a new Trial.

Mr. Justice WILLES thought the Direction was Right.

In Ejectment, the Plaintiff must recover upon the Strength of his *own Title*.

The only Proof here is, "that the Witness said that Mrs. *Haldane* had conveyed to *Urry*;" But he *would not produce* the Deed of Conveyance to *Urry*, though actually in Court.

I don't

I don't say that the Court could *oblige* them to produce this Deed. But I think the Title of the Plaintiff was *not* complete; the Deed *not* being produced.

Parol Evidence could not be given by the *Party* who had the Deed in his *Power*, and refused to produce it; though it might be the *adverse Party*. It is reasonable, that if one Party is in Possession of a Deed, and refuses (after proper Notice) to produce it, the *other Side* should be admitted to prove the Contents by inferior Evidence: But there is no Reason why the Possessor of the Deed should be allowed to give such inferior Evidence, when he *can* give better, if he pleases.

LORD MANSFIELD observed, that in *Civil Causes*, the Court will force Parties to produce Evidence which may prove against themselves; or leave the Refusal to do it (after proper Notice) as a strong Presumption, to the Jury. The Court will do it, in many Cases, under particular Circumstances, by Rule before the Trial; especially, if the Party from whom the Production is wanted applies for a Favour. But in a *Criminal* or *Penal Cause*, the Defendant is never forced to produce any Evidence; though he should hold it in his Hands, in Court.

Per Cur'.

RULE DISCHARGED.

Cuming *versus* Sibly.

ERROR was brought by the Defendant below, upon a Judgment for the Plaintiff in C. B. in an Action of Debt, upon the Bribery-Act of 2 G. c. 24. § 7. Upon the Trial, a Verdict was given for the Plaintiff, for 1000*l.* and 1*s.* Damages; besides his Costs and Charges; and so much for his Costs and Charges: And Judgment was entered accordingly, and for Costs *de incremento*, so much; amounting in the Whole to so much.

The Error objected was, "that the Plaintiff is not intitled to Damages: No Damages for Detention of the Debt can be given in a popular Action." 1 Roll's Abridgment 574. Letter P. pl. 1. and pl. 4. in Point. So also was the Case of Sir Thomas Frederick v. Andrew Lookup: (Which Case may be seen at large, *ante*, p. 2018 to 2022*.)

Mr. Abbott, for the Plaintiff below, answered, that that was an Action on the Gaming Act; and was brought for the Money lost, and the treble Value. And he said there is a

* N. B. In that Case, the Court reversed the Judgment as to the Difference Damages and Costs.

Difference between Penal Statutes which give a Sum *certain* and an Action of Debt to the Party suing ; and those which give an *uncertain* Sum, (as to recover treble Damages.) In the latter Case, there can be no Damages for the Detention, nor any Costs: But in the former, the Plaintiff shall recover both his Damages and Costs.

The Case of *North v. Wingate*, in *Cro. Car.* 559, lays down and establishes that Distinction. And *3 Lev.* 374. *Sedgwick, qui tam &c, v. Richardson*, takes the same Distinction, and is at least a tacit Authority for me. And he observed, that the Declaration always lays it to the Plaintiff's Damages.

Here, a Right is attached in the Plaintiff, by bringing the Action : And the Defendant ought to have paid the Money immediately upon Demand. Therefore the *1s.* Damages for the Detention is right ; and the Judgment ought to be affirmed *in toto.*

But, at least, it ought to be affirmed as to all the Rest, but the *1s.* Damages.

Mr. Serjeant *Glynn*, *contra*, for the Plaintiff in Error, replied, that in the Case cited from *Cro. Car.* 559, the Plaintiff was the Party grieved : And in *3 Lev.* 374, nothing was determined, upon that Part of the Case.

He insisted, that *no* Damages for Detention of the Debt can be given in a popular Action ; because Nothing, no Interest is attached to the Plaintiff, before his bringing the Action : He had, before that, no more Right than any other Man. Therefore the giving him Damages is erroneous.

Consequently, the Judgment must be reversed both for the *1s.* Damages, and for the *Costs* : as the *Costs* are *incorporated* with the Damages.

LORD MANSFIELD—There are *no Damages* to be given in these popular Actions. The *Statute* gives *Costs*, indeed : But here the Damages and *Costs* are blended together.

Where the Plaintiff below brings a Writ of Error, we may not only reverse what is wrong ; but give Judgment for what is right. Where the Defendant below brings a Writ of Error, we only reverse such wrong Part of the Judgment, as he complains of.*

**Vide ante,*

p. 2156. and

1 Salk. 262.

Mr. Justice *YATES*—The Plaintiff has no Right to the Debt, till *after Conviction*. Therefore he can have no Right

Right to Damages for the Detention of it. And as the Costs and Damages are incorporated, the Judgment must be reversed as to both Damages and Costs.

THE COURT all agreed, that the Judgment ought to be reversed both as to the *Damages and Costs*; and affirmed as to the *Debt*.

RULE ACCORDINGLY.

Rex *versus* Berney Brograve, Esq.

ON the Second Day of this Term, Mr. Solicitor General (*Dunning*) moved to quash an Order of Sessions confirming a Rate made for the Relief of the Poor of the Parish of *Worstead* in the County of *Norfolk*.

THE ORDER objected to, was made at the General Quarter-Sessions holden for the County of *Norfolk*, on the 5th of April 9 G. 3. and was in the following Words.

Whereas *Berney Brograve*, Esq. one of the Inhabitants of *Worstead* in the County of *Norfolk*, appealed to this Court, to be relieved against a Rate made, in due Form, the 6th Day of January 1769, for the Relief of the Poor of the said Parish, wherein the said *Berney* is assed of 160*l.* 3*s.* 9*d.* per Annum; whereof 3*l.* 15*s.* is charged for the Profits of a Fair held once in every Year in the said Parish; and for Inequality throughout the whole of the said Rate. And whereas it was admitted, on the Hearing of the said Appeal, " that some Time in the Year 1763, the said *Berney Brograve* appealed from a Poors Rate then made for the said Parish; and that afterwards, the said Appellant and the then Officers of the said Parish of *Worstead* referred all Matters in Dispute touching the said former Rate, between the said Appellant and the then Officers of the said Parish, to the Determination of Three of his Majesty's Justices of the Peace for the said County then acting for that Division to which the said Parish of *Worstead* did belong; That in the Year 1764, the said Three Justices, in order to settle all Disputes, did recommend all Parties to consent to the Rate then made according to the Method they had formerly taken; but did not particularly recommend nor object to the Mode of Rating itself, which was, that All Occupiers of Land in their several Occupations, within the said Parish, should be assed at three fourths of the YEARLY VALUE of such Land: and that all Occupiers of Houses within the said Parish should

" should be assed after the Rate of *One Moiety* of the
 " *YEARLY VALUE* of their respective *Houses*; to which
 " Rate so made, the Appellant, being present, did
 " CONSENT AND AGREE; And that the Churchwardens
 " and Overseers of the said Parish did accordingly *continue*
 " to make their Rates for the Maintenance of the Poor pur-
 " suant to such Agreement, and did therein assed the Ap-
 " pellant and all other Occupiers of *Land* within the said
 " Parish at *three fourths* of the yearly Value, and the Occu-
 " piers of all *Houses* within the said Parish at *One Moiety*
 " only of their respective *yearly Value*; and did continue
 " assing them in such Manner down to the *Michaelmas*
 " Quarter 1768." That the Appellant, thinking himself
 aggrieved by the Assessment made for the Relief of the Poor
 from *Midsummer* to *Michaelmas* 1768, did, in the latter End
 of *November* or the Beginning of *December* now last past,
 and before the Rate appealed from was made, give Notice
 to the Churchwardens and Overseers of the said Parish,
 " that unless the said Parish Rates were altered, he the
 " said Appellant would not abide by them; and that he was
 " quite dissatisfied with the said Rates;" but did not then
 or at any other Time make any particular Objections to the
 said Rate or the Mode in which the same was made, until
 the Time of hearing the said Appeal. That the said
 Churchwardens and Overseers of *Worstead* aforesaid did,
 on the 6th Day of *January* last past, make a Poors Rate for
 the said Parish, for one Quarter of a Year from *Michaelmas*
 to *Christmas* last; wherein they did assed and rate the said
 Appellant and all other Occupiers of *Lands* within the said
 Parish, at and after the Rate of *three fourths* of their respec-
 tive *yearly Value*, and the Occupiers of all *Houses* in the said
 Parish at and after the Rate of *One Moiety* of the respec-
 tive *yearly Values* of the Houses in their respective Occupa-
 tions, within the said Parish; from which Rate, Mr. *Bro-*
grave appealed. And it appeared, that all other Persons
assessed to the said Rate had paid to the same, except the said
Mr. *Brograve*. And now, at the hearing of the said Appeal
from the Whole of the last mentioned Rate, the Appellant
made many Objections to the said Rate; and in particular,
" for that he was rated 3*l.* 15*s.* for the Profits of the *Fair*
" in the said Parish," (which, upon Evidence, appeared to
be Let by him to —— *Fowler*;) and also, " for that
" *Henry Middleton*, who occupied about Seven Acres of
" Land as Tenant to the Appellant was not rated for such
" Land."

And therefore the Court [of Sessions] ordered the said
last mentioned Rate to be *amended*, by striking out the par-
ticular Part wherein it appeared " that the Appellant was
" rated and assed for the said *Fair*," and by therein assing
the said *Henry Middleton* for the said Seven Acres of
Land; he the said *Henry Middleton* being present in Court,
and

and consenting thereto : And they have *amended* the Rate accordingly ; but *confirmed* the said Rate, as to *all the Rest*.

Mr. Dunning, Solicitor-General on behalf of Mr. * Brograve, moved to quash this Order of Sessions ; objecting, that it was an *unequal Rate* ; and that it appeared, upon the Face of it to be so : For that the Occupiers of *Houses* and the Occupiers of *Lands* ought to be rated *equally* ; and there was no Pretence to Rate the latter at *three-fourths* of their yearly Value, when the former were only rated at *two-fourths*. * Mr. Brograve was much dissatisfied at the State of the Case ; and asserts, that the Facts are not rightly represented, as the Order is drawn up.

LORD MANSFIELD said, he, did not see any apparent Inequality. He thought it right and proper, that there should be a Difference made between Lands and Houses (as Repairs, Window-taxes, and such like Deductions and Outgoings,) which do not fall upon Lands to lessen their Value. And this Mode of Taxation was agreed to by the Parish in 1764, and by the Appellant himself, being then present ; and was continued till 1768.

Mr. Dunning objected, nevertheless, to the laying down any *standing, invariable, perpetual Rule* in a Parish : And as this Rule is now perceived to be an unequal and inequitable one, this Appeal was brought, in order to *correct* it, and to fix a true just and equal One, suitable to the Circumstances at present existing.

LORD MANSFIELD—The Justices have thought it an equal Rate ; and all the Parish were of that Opinion in the Year 1764.

Mr. Justice YATES—The Court can't enter into the Inequality of it ; unless it appears to Us to be self-evidently, necessarily, and unavoidably unequal.

THE COURT gave him a Rule to shew Cause ; but with very small Hopes of their being persuaded to make it absolute.

Mr. Serjeant Foster now shewed Cause, why the Order of Sessions should not be quashed, nor the Rate which stood confirmed by it.

Mr. Solicitor-General still insisted that it was an *unequal Rate* ; and that an *unequal Rate* was an *unjust Rate*.

The *Rent*, he said, was the Rule of rating.

This

This is a Rate upon the *Occupier*, not upon the Land. And an Occupier of a *House* of 20*l.* a Year is generally better able to pay his Rate, than a Farmer who occupies a Farm of 20*l.* a Year.

The Court will understand the Word “*Value*” in the Order, to mean the yearly *Value*, and not the yearly *Rent*. It is impossible therefore to construe this to be an equal Rate; when it directs “that Lands shall for the future pay “Three-fourths of the yearly Value; and Houses only half “of their yearly Value.”

THE COURT were clear they could not set this Rate aside, unless it appeared manifestly to be unequal: They could not presume it to be so. But it would be impossible to presume an Inequality in the present; when, on the contrary, this Gentleman himself has approved of it; and all the other Parishioners have agreed in it.

Per Cur. unanimously—

RULE DISCHARGED and ORDER AFFIRMED.

Monday,
27th Nov.
1769.

Rex versus Samuel Vaughan.

ON Friday the 17th Instant, Mr. Dunning, Solicitor-General, moved for an Information for a Misdemeanour, at the *private* Prosecution of the Duke of Grafton, (then first Lord of the Treasury.)

He produced an Affidavit of the Duke of Grafton's, proving a Letter to be received by him from the Defendant, containing an Offer of paying 5000*l.* into the Hands of Mr. Henry Newcome, to be delivered by him to the Person who should procure a Patent of the Reversion of the Office of Clerk of the supreme Court of the Island of Jamaica, for the Lives of Mr. Vaughan's Three Sons, or the Lives of Three other Persons to be named by him.

He had likewise Affidavits to authenticate the Hand-writing of Mr. Vaughan.

Mr. Vaughan sent a *Cafe* also to the Duke, desiring his Perusal of it at his Leisure; which *Cafe* related to the Nature &c, of this Office.

It

It was accompanied by a Letter of his Grace, inclosing an Affidavit; which Affidavit Mr. Vaughan says, "will shew "the *Proposal*; which will be ENCREASED if necessary." The Letter offers to "leave Security in Mr. Henry Newcome's Hands, to answer Paying the 5000*l.* to the Order of the Person who should procure the said Patent." And it concludes—"I will take an Opportunity of waiting upon your Grace; hoping the Honor of a Conference; otherwise, to receive back this Affidavit, in order to destroy the fame."

The Affidavit inclosed in this Letter was made before the Lord Mayor of London. It represented this to be a Matter that required the utmost Secrecy: And it is thereby sworn, (besides what is above mentioned) "that this whole Affair is an entire Secret to every One but Mr. Henry Newcome; and that, whether his present Proposal shall prove efficacious, or be rejected, he never will disclose it to any Person whatsoever."

The Court had asked Mr. Solicitor-General upon his first moving this Matter, "In whose Disposition this Office was;" and wished, that there might be an *Affidavit* to that Purpose.

Accordingly, an *Affidavit* of one Mr. Pollock was now produced and read—"that the Office was in the Disposition of the King; and passed by a Grant under the Great Seal, which took its Rise from a Sign-manual counter-signed by one of the Secretaries of State."

There was likewise another *Affidavit* now read, of one Mr. Reynell—"That the supreme Court of Jamaica is like the Three Courts of B. R. C. B. and Exchequer in England: Besides which, they have also a Court of Chancery."

Mr. Wedderburn and Mr. Lee, on behalf of the Defendant, now shewed Cause against granting an Information.

This Office of Clerk of the supreme Court of the Island of Jamaica was sold under a Decree in Chancery here, upon the *Cestui qui* trust of it dying insolvent.

Mr. Lawton bought it, and afterwards devised one Moiety of it. The Representatives of Mr. Paxton sold the other Moiety. The Subdivisions of it have been since both devised and sold. The Office was, consequently, very carelessly executed by Deputies.

Mr.

Mr. Vaughan took a Lease of the Office in 1765; and put it upon a proper Footing. He went to Jamaica in 1765; and returned in 1766; and then applied to the Duke of Grafton and Mr. Conway, who were then the Two principal Secretaries of State, for a Grant of the Reversion. He applied to the Duke through this Mr. Newcome. The Duke's Answer was, "That he did not meddle out of his own Department." One Mr. Howell was attempting to procure it, and to get in the subsisting Interest: pretending to have the Patronage of the Duke of Grafton in the Point he was pursuing. This alarmed Mr. Vaughan on account of his Lease, as well as of the Reversion. Howell and Vaughan had a Treaty upon this Subject: And Howell persisted in his Attempt. Mr. Vaughan thought that Howell's Interest must arise from Money; and therefore counteracted him by the same Means: And, to remove all Ideas of using this Application as a Trap, he made the Affidavit of Secrecy, and sent it inclosed to Mr. Newcome. Mr. Newcome returned the Affidavit: And then Mr. Vaughan sent it to the Duke.

The old Rent of the Office (the *nett* Rent) was 400*l.* per Annum: It has been now lately raised to 750 Guineas for the Moiety of it. The Office had been sold, devised, leased, and very badly executed by Deputy.

Mr. Vaughan never mentioned the Affair to any One. And yet two Letters appeared in the public Paper, calculated to affect Mr. Vaughan's Character; but fictitious in several Articles. These spurious Letters represented him as a Man that had abandoned his Connexions and Principles. They treated Mr. Vaughan's Conduct, as extremely silly, and very unlikely to have its Effect; and also as shewing the utmost Ignorance of the World.

But as he took the Office to be a *saleable* Office, his only Offence could be, that he suspected the noble Duke to be capable of listening to this his Offer. And his Affidavit only meant to clear him from intending to trap the Duke into a Transaction with a Man obnoxious to him in Politics; and then discover it.

They hoped, the Court would not add the Weight of their Opinion, to the already prejudiced Opinion of the Public.

They then argued that this was no Offence at all.

The Solicitation to take Money for an Office in the Colonies, is no Offence. It would have been no Offence, even if the Act itself had been done; and the Office had been granted pursuant to the Solicitation.

It is not within 5, 6 Ed. 6. c. 16. That Act does not extend to the *Colonies*. The saving in § 7. shews that it was no Offence at Common Law; that it was not illegal: For, this Proviso leaves it to the two Chief Justices of B. R. and C. B. and Justices of Assize, to do as they might have done before, in any Office to be given or granted by them. This proves that the Legislature did not consider this Sale of Offices to be *Malum in se*.

The Case of *Blankard v. Galdy* (in 2 *Salk.* 411. and 4 *Mod.* 215.) also proves the same Point; because Judgment was given for the Plaintiff. That Case was an Action of Debt upon Bond, conditioned for performing Articles of Agreement concerning the Office of Provost-Martial of *Jamaica*: And it was then settled and determined, " that this " "Act of 5, 6 Ed 6. does not extend to *Jamaica*."

In the Case of *Godolphin v. Tud'r*, it was determined that if the Reservation be out of the Profits, the Depuration is good. But if it be the Sum in gross; then it is within the Statute.

The Sale of any Office is not *Malum in se*; notwithstanding the inaccurate Report of the Case of *Stockwell v. North*, in *Noy* 102, and also in *Moor* 781. It is no Offence at Common Law: "Tis no Crime; no Object of positive Punishment. It is not immoral, if a good Man and a sufficient One is promoted to the Office. Neither is it unlawful: For, in the Case in *Salkeld*, Judgment was given for the Plaintiff. Nor is there any Resolution or even Dictum " that it is unlawful."

The Offices at the Rolls and in the Exchequer concern the Administration of Justice, and are not within the Proviso in the Act: And yet those Offices are sold.

Therefore if the Act had been done, and the Proposal carried into Execution, it would not have been punishable at Common Law. Much less then, can the mere *Solicitation* to do it be so; no Act being done, in Consequence of it.

There is one Case of a *Solicitation* to commit *Perjury*, none being actually committed; in 2 *Shower* 1. *Rex v. Johnson*, an Attorney. But this is a single Case, and very imperfectly reported.

Mr. Dunning, Mr. Wallace, and Mr. Ranby, *contra*, for the Prosecutor.

The Charge is an Attempt to corrupt the Duke of *Grafton* in the Disposal of an Office of *Trust*, in the *Colonies*, concerning
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ing the Administration of Justice ; to influence a Privy Counsellor and first Lord of the Treasury, to give his Advice under a Bribe.

As to this Office being once *sold under a Decree*—It does not appear, what was then proved or understood about the Nature of the Office. But even if it is saleable, that will not warrant a Man to solicit One of the first Officers of the Crown to take a *Bribe for procuring from the Crown the Disposal of the Reversion of it.*

This Attempt is *criminal* in the Tempter : And the Court will declare it to be so, by granting this Information.

The Judgment of the Court in the Case of *Blankard v. Galdy*, might have been given, because the Matter was *not within the Act.*

But neither that Act nor the Act of 12 Ric. 2. c. 2. mentioned in Lord *Macclesfield's Trial*, are necessary to support this Motion.

It may be neither criminal or dishonourable, to *sell* Offices which are *saleable*. But granting that Point, yet the Method which Mr. *Vaughan* has taken to come at this Office, is criminal. *1 Hawk. P. C. c. 67. Title, "Bribery," p. 168, 169.* is strong to this Purport.

In Lord *Macclesfield* Case, the Offence charged was taking Money for appointing, and taking Money for *recommend-ing* to Offices. That Prosecution was not founded upon Statute, but upon Common Law. One of those Offices, Clerk of the Custodies, (*v. Art. 9.*) was in the Gift of the Crown ; and Lord *Macclesfield* insisted on a Right to recommend. But yet he was not to *take Money* for that Recommendation.

So here Mr. *Vaughan* offered the Duke of *Grafton* 5000l. for such Recommendation : Which Money the Duke ought not to take for it.

This Offer is *criminal* ; because the Taking the Money was incompatible with the Duty of the Duke of *Grafton*, as a Privy Counsellor and first Lord of the Treasury : It was offered, to tempt the Duke to *betray his Trust*, by giving his Advice to the King under such a corrupt Motive.

To *solicit and counsel* the Committing of a Crime, is criminal.

As to the Case of *Rex v. Johnson*, in 2 *Sherw.* p. 1 — It shews that the Charge was considered as an Offence; though the Judges differed about the Measure of the Punishment.

As to what has been urged about this Solicitation not being criminal, because there was no *Act* done in Consequence of it.—The Case of *Rex v. Plympton*, 2 *Lord Raymond* 1378. is in Point: For, that does not appear to be a Promise accepted, or the Money paid. This very Exception, “that the ‘Promise was no Crime, without shewing the *Fact done*,” was taken, and over-ruled.

In *Bush v. Rawlins*, Tr. 29, 30 G. 2. B. R.*—No Doubt *Vide ante, was made whether it was not an Offence at *Common Law*: vol. 3. The Question was “Whether it was *within the Act*.” p. 1236.

Here was an ill Intention in the Tempter; and an Ability in the Duke to perform the Thing proposed, if he had listened to the Proposal.

LORD MANSFIELD—The Defendant himself thought this Transaction would not bear the Light. His Affidavit says “It was a Matter that required the utmost Secrecy.” The extraordinary Security for the Money, which he proposed to leave in Mr. Newcome’s Hand; the Affidavit offering to pay it, and swearing to keep it a profound Secret: and the other Circumstances, all prove that he himself looked upon it as an unjustifiable Transaction.

If these Transactions are believed to be frequent, it is Time to put a stop to them.

A Minister trusted by the King to recommend fit Persons to Offices would betray that Trust, and disappoint that Confidence, if he should secretly take a Bribe for that Recommendation.

A terrible Consequence would result to the Public, if every Thing that such an Officer is concerned in advising the Disposal of, should be set up to Sale.

I am therefore for making the Rule absolute. He may demur, or move in Arrest of Judgment, or appeal to a higher Judicature. I am clear, that this is a Misdemeanor, and punishable as such. But nevertheless I shall be open to hear Arguments on a Demurrer, or in Arrest of Judgment, without Prejudice.

As to the Statutes of 12 R. 2. c. 2. and 5, 6 Ed. 6. c. 16. I agree with Mr. Solicitor-General, “That the Argument does P p 2 “ not

" not turn upon their extending or not extending to *Jamaica* ;" For, this Office is granted under the Great Seal.

The Argument is strong, that these Statutes do not extend to *Jamaica*; though they were enacted long before that Island belonged to the Crown of *England*.

If *Jamaica* was considered as a *Conquest*, they would retain their old Laws, till the Conqueror had thought fit to alter them.

If it is considered as a *Colony*, (which it ought to be, the old Inhabitants having left the Island,) then these Statutes are positive Regulations of Police, not adapted to the Circumstances of a new Colony; and therefore no Part of that Law of *England* which every Colony, from Necessity, is supposed to carry with them at their first Plantation.

No Act of Parliament made after a Colony is planted, is construed to extend to it, without express Words shewing the Intention of the Legislature to be "that it should."

But here, the Office is granted by Letters Patent under the Great Seal of *England*; and therefore must be governed by the Laws of *England*.

So that it turns upon the *Common Law*. And the first Consideration is, whether a great Officer, at the Head of the Treasury and in the King's Confidence, selling his Interest with the King, in procuring an Office, be not guilty of a Crime.

The King is not to raise a Revenue out of this Office. The Duke swears, and it is not denied, "That the 5000l. was offered to him, to procure this Office for Mr. Vaughan."

Can it be doubted whether the doing this would have been criminal in the Duke of *Grafton*? I suppose that most of the Impeachments against Ministers have been for taking Money to procure Offices grantable by the Crown.

Wherever it is a Crime to *take*, it is a Crime to *give*: They are reciprocal. And in many Cases, especially in Bribery at Elections to Parliament, the *Attempt* is a Crime: It is complete on his Side who *offers* it.

If a Party offers a Bribe to a Judge meaning to corrupt him in a Case depending before him; and the Judge taketh it not; yet this is an Offence punishable by Law, in the Party that

that offers it. 3 Inst. 147. So also a Promise of Money to a Corporator, to vote for a Mayor of a Corporation; as in *Rex v. Plympton.** And so also must be an Offer to bribe a^{*} 2 Lord Privy Counsellor, to advise the King.

Raym.
1377.

Therefore it appears to me that this is a Misdemeanor.

But if it be in the least doubtful, I would have it put in such a Way, that a Judgment may be solemnly had upon it.

Mr. Justice YATES—This has not the least Resemblance to the Sale of an Office. This Charge is for attempting improperly the procuring of the Office; not for giving a Price for bestowing it. It is an Office in the Gift of the Crown; not of the Duke himself.

The Affidavit which mentions “that the Matter requires ‘the utmost Secrecy,’ shews the Defendant’s own Sentiments about it: And he desires, in Case of Non-Acceptance of his Offer, to have the Affidavit back again, in order to destroy it. This don’t agree with the Excuse about a Trap.

No Doubt, this is an Offence at Common Law.

If it be but questionable, it ought to be inquired into: ’Tis a Matter fit for Inquiry. It may hereafter be more solemnly determined, on Demurrer, or in Arrest of Judgment, or otherwise.

Mr. Justice ASTON and WILLES concurred.

Per Cur. unanimously —

RULE made ABSOLUTE:

Evan Thomas *versus* Goodtitle.

Tuesday
28th Nov.
1769.

IN Ejectment, on a Writ of Error from C. B. Evan Thomas, the Defendant below, and now the Plaintiff in Error, offered to become Bail to prosecute the Writ of Error, and to justify in Double the Rent.

Judgment had been given for the Plaintiff in Ejectment; and also for 29l. Costs.

Mr. Griffith Price opposed the Bail, on Affidavit of his Insolvency, and having been discharged out of Gaol as an Insolvent

solvent Debtor ; and alledged that the Plaintiff in Ejectment had a Mortgage upon the Premisses, for as much as they were worth.

See the Act of 16, 17 C, 2. c. 8. § 3. which directs, that the Plaintiff in Error should be bound to the Plaintiff in the Action of *Ejectione firmæ &c.* in such reasonable Sum as the Court to which such Writ of Error shall be directed shall think fit; with Condition, that if the Judgment shall be affirmed in the Writ of Error, or the Writ be discontinued in Default of the Plaintiff therein, or the Plaintiff be Nonsuit in such Writ of Error, that then the Plaintiff shall pay such Costs, Damages, and Sums of Money, as shall be awarded, upon or after such Judgment affirmed, Discontinuance, or Nonsuit had.

The COURT, on Consideration of the Clause in the Statute, and also of the Practice, (which is to require him to *justify in Double the Rent*) did accordingly admit him to be Bail : And, the Rent being 16l. per Annum, he justified in Double that Sum (32l.)

They said, they had Nothing to do with the Mortgage.

Jacobs's Cafe.

ON a Motion of Mr. Kenyon's for Jacobs to answer the "Matters of an Affidavit,"

[†] See the Note in p. 651, vol. 1. and quash-
ing Indict-
ments and
Orders.

The COURT declared, That on the last Day of the Term, there can not be a Motion to answer the Matters of an Affidavit, with Relation to Attachment, any more than a Motion for an Attachment. They held it to be contrary to the Practice *.

MOTION DENIED.

Belchier versus Gansell.

IN an Action for 2334l. Bail had justified : But, as the Plaintiff did not like them, he and his Attorney therefore obtained a Side Bar Rule "for Leave to discontinue that Action, upon Payment of Costs;" not disclosing, that Bail had justified in the Action which he prayed to discontinue. Then he brought a new Action, upon the very same Bonds ; only laying the new Action in Middlesex instead of London. The Plaintiff made a fresh Affidavit of the Debt being due ; and

and carried this Affidavit and the Declaration in the new Action, to Mr. Cowper the Clerk of the Rules, and insisted upon his marking upon the Declaration "that such a Debt was "sworn to;" in order to carry such a Declaration so marked by Mr. Cowper to the Marshal, and charge Mr. Ganfel, in Custody, with this new Declaration. The Scheme was, to detain him in Custody of the Marshal till the next Term; as, this being the last Day of the present Term, Mr. Ganfel would not be able to justify Bail in this new Action, till next Term.

Mr. Cowper himself first disclosed this Matter to the Court; and prayed their Direction.

The COURT sent Orders to Mr. Priddle, the Plaintiff's Attorney, (by his Clerk,) "to attend the Court immediately." Which he soon afterwards did; and cited, in his own Justification, 2 Stra. 1.216 *Olmius v. Delany*: Which is indeed a very strong Case; rather stronger than the present, as the Defendant was there holden to special Bail in the second Action, though he was arrested upon it before the former was discontinued.

Mr. Mansfield then moved against him; but was in Doubt what to pray.

Mr. Serjeant Davy appeared for Mr. Priddle; and said he had done it by the Direction of his Client Mr. Pelchier the Plaintiff; who had discovered, "that the Bail in the first "Action were worth Nothing at all, but totally insufficient:" And this was only taking the likeliest Method of securing the Payment of a just Debt.

The COURT * were, at first, doubtful, what Method * Lord Mansfield they should take. They held this to be a Trick, and an un-warrantable Conduct in the Attorney; and that it ought not to have the intended Effect: He ought to have asked Leave of the Court "to charge the Defendant in Custody; disclosing the Whole of the Case to them. They first thought of making a Rule now, for the Defendant "to shew Cause "why the Plaintiff should not be at Liberty to do so."

But at length, They discharged the Side-Bar Rule which gave the Plaintiff Leave to discontinue. So that the Bail to the former Action (which had justified as aforesaid) still remained liable to their Recognizance.

Rule to discontinue, DISCHARGED.

Curgenven

Curgenven *versus* Penhallow Cuming Esq.

THIS was an Action of Debt brought upon the Statute of 2 G. 2. c. 24. against Bribery at Elections to Parliament.

In Trinity Term last, the Plaintiff declared against the Defendant for 6000l. for bribing Twelve Persons, to vote at the last Election for Members to serve in Parliament for the Burrough of Tregoney in the County of Cornwall,

The Defendant pleaded *Nil debet*: And Issue was thereupon joined.

The Cause came on to be tried at the last Assizes for Cornwall before Mr. Justice WILLES; and a Verdict was found for the Plaintiff on the 1st, 4th, 5th, 7th, 8th and 12th Counts, in the Penalties of 3000l. with 1s. Damage, and 40s. Costs: subject to the Opinion of the Court of B. R. upon the following Case.

CASE—The Defendant proved a Copy of a Judgment in the Court of Common Pleas, of Hilary 9 C. 3. between the said Penhallow Cuming, Plaintiff, and one John Sibley, Defendant; by which Judgment it appeared, that the said Cuming had obtained a Judgment against Sibley for 1000l. upon the said Statute of 2 G. 2. c. 24. against Bribery at Elections.

The Defendant also proved, that a *Capias ad respondendum* issued in the same Cause on the 20th of December 1768; teited the 28th of November 1768.

The Question was “Whether the said Defendant Cuming is a Discoverer indemnified under the said Act of 2 G. 2. so as to be discharged from the Penalties and Disabilities incurred by the Offences mentioned in the Declaration in this Cause.”

It was argued on Tuesday the 14th of this Month by Mr. Serjeant Burland for the Plaintiff, and Mr. Mansfield for the Defendant.

Lord MANSFIELD observed, that the Court had not said nor would say, “That a Plaintiff can not be the Discoverer.” But the Act of Parliament does not make him so, or consider him as the Discoverer. Here is no Evidence that the Plaintiff was the Discoverer. And another Person must have been the Witness: For, the Plaintiff could not be the

the Witness himself. It is not to be presumed, *without any Evidence at all of it*, "that the Plaintiff in the Action was the Discoverer."

His Lordship asked, if the Case of *Gardiner v. Horne* was ever determined. [This Question was not expressly answered. But Mr. Mansfield said, he understood, that the Court of C. B. there looked upon the Plaintiff in the Action as being conclusively the *Discoverer*: Which Mr. Dunning doubted.]

Mr. Justice ASTON owned he had some Difficulty, whether this Act of Parliament ought not to receive the same Construction as the Acts relating to Coiners, Horse-stealers, &c (In which Opinion Lord MANSFIELD acquiesced; and added that it meant to encourage Offenders to discover each other.)

Here, it is not stated, *who* was the first Discoverer: Therefore the Case is not completely stated.

Mr. Justice WILLES—*This Cause was the first tried. There was no Other Person who claimed to be first Discoverer. 3000l. is a great Penalty: And there can be no Harm in taking Time to consider it.*

LORD MANSFIELD said, he had no Notion that the Act meant to consider the Plaintiff as *conclusively* the Discoverer. It is impossible to give an Opinion upon this Question, without considering him in that Light: For, the Verdict is given for the Plaintiff.

Mr. Justice ASTON doubted whether it would not be the better Method to move for a new Trial. And

Mr. Justice YATES said there was *no other Method*. The producing the Record does not prove "That the Plaintiff is *conclusively* the Discoverer." This stands as if it had been pleaded, and demurred to. We can not give Judgment for the Defendant. But here, the Evidence was not carried on; It is only *prima facie* Evidence.

The COURT were of Opinion, That there ought to be a new Trial.

Mr. Mansfield did not desire a new Trial; if the Court would be of Opinion, "That upon the *present* Evidence, "there was *not* sufficient to support the Verdict." But being told he must make his Election; he desired Time to consider. And now,

Mr.

Mr. Dunning and Mr. Wallace agreed that it should go down again to Trial, without Payment of Costs.

The End of *Michaelmas Term, 1769, 10 G. 3.*

IN the Vacation after this *Michaelmas Term 10 G. 3,* and a little before the Beginning of *Hilary Term, 1770,* the following Events happened.

1770, Ja- **LORD CAMDEN** resigned the Great Seal: Which, after
nuary 17th. its having been offered to **LORD MANSFIELD**, who declined
to accept it, (as he had before done,) when the Custody of it
was given to **Sir Robert Henley**,

17th. The Honourable **Mr. Charles Yorke** received, the same
Evening, from the Hands of his Majesty.

20th. He died. Whereupon, the next Day,

21st. It was delivered to **Mr. Baron Smythe**, **Mr. Justice Barthurst**, and **Mr. Justice Aston**; to hold in Commission.

22d. Sir **Fletcher Norton** was chosen Speaker of the House of
Commons, in the Room of **Sir John Cuff**; who, having been
taken ill a few Days before, had requested the House to choose
another Speaker: Soon after which Choice, *viz.* on the 25th
of January, **Sir John Cuff** died.

Hilary

Hilary Term

10 Geo. 3. B. R. 1770.

Rex *versus* Inhabitants of *that Part of the Parish* ^{Wednesday}
of Weston under Penyard, which lies in the County of Gloucester.

M R. Griffith Price and Mr. Bearcroft shewed Cause, on behalf of the Prosecutor, against a Rule which had been obtained by Mr. Selwyn, on the Third Day of last Term, for the Prosecutor to shew Cause why the Judgment against Defendants should not be arrested.

This was an Indictment found in the County of Gloucester, and removed into this Court by *Certiorari*. (It is filed, of Easter Term 8 G. 3. No. 3.)

The Jury present, that there had been from Time immemorial, a certain Common King's Highway leading from the Market Town of *Mitchell Dean* in the County of Gloucester, towards and unto the Market-Town of *Ross* in the County of Hereford, for Horses, Coaches, &c.; and that a certain Part of the said Common Highway, leading from a Place called *Suffont-Poole* to another Place called *Lea-Bailey*, lying in the County of Gloucester, and containing in Length Fourteen Hundred Yards, and in Breadth Ten Yards, situate lying and being in *that Part of the Parish of Weston under Penyard which lies in the County of Gloucester*, was on the 11th of July 7 G. 3. ruinous, &c.; and that the *Inhabitants of THAT PART of the Parish of Weston under Penyard which lies in the County of Gloucester* ought to repair it, &c.

In Hilary Term 9 Geo. 3. John Yem and Thomas James, two of the Inhabitants of *that Part of the Parish of Weston under Penyard which lies in the County of Gloucester*, for themselves and the rest of the Inhabitants of *that Part of the said Parish*, &c. plead, that *Part of the said Parish of Weston under*

under Penyard lies in the County of Hereford, and other Part of the said Parish lies in the County of Gloucester; and that all the Inhabitants of the said Parish of Weston under Penyard, as well those Inhabitants of *that Part* of the Parish which lies in the County of Hereford, as those Inhabitants of *that Part* of the said Parish which lies in the County of Gloucester, from Time whereof the Memory of Man is not to the contrary, have used and been accustomed *jointly* to repair, and still of Right ought *jointly* to repair and amend *that Part* of the said Highway in the said Indictment mentioned and supposed to be ruinous, in Decay, and out of Repair, when and so often as hath been necessary and Occasion required: *WITHOUT THIS*, " that the Inhabitants of *that Part* of the said Parish of Weston under Penyard which lies in the County of Gloucester ought to repair and amend the said King's Common Highway so in Decay aforesaid, when and as often as there is Occasion," as by the said Indictment is above alledged. And this they are ready to verify. Wherefore the said John Yem and Thomas James pray Judgment, if they and the Rest of the Inhabitants of *that Part* of the said Parish of Weston under Penyard which lies in the County of Gloucester ought, *separately and exclusive of the Rest* of the Inhabitants of the said Parish, any further to be prosecuted on account of the not repairing or amending the said Highway.

The King's Coroner and Attorney replies (in Trinity Term 9 G o 3.) That, by any Thing by the said Plea above alledged, our Sovereign Lord the King ought not to be barred from prosecuting the said Indictment against the said Inhabitants of *that Part* of the Parish of Weston under Penyard which lies in the County of Gloucester: because, for our Lord the King, he saith, as before, 'That the Inhabitants of *that Part* of the said Parish of Weston under Penyard which lies in the County of Gloucester ought to repair and amend the said King's Common Highway so in Decay as aforesaid, when and as often as there is Occasion. And this, the said Coroner and Attorney of our said Lord the King, for our said Lord the King, prays may be inquired of by the County: And the said John Yem and Thomas James, Two of the Inhabitants of *that Part* of the Parish of Weston under Penyard which lies in the County of Gloucester, for themselves and the Rest of the Inhabitants of *that Part* of the said Parish, do so likewise.'

This Issue went down to Trial: It was tried before the Lord Chief Baron Parker; and a Verdict was found for the King.

Mr. Salvyn had moved (on Wednesday the 8th of November 1761) for the Defendant, in Arrest of Judgment; on the following Objection.

The

The Indictment concludes, that the Inhabitants of *that Part of the Parish* (lying in two different Counties) which lies in *one of the Counties* ought to repair this Road, which is described to lie within *their County*.

The Defendants have pleaded, that the *Parish lies Partly in one County, and Partly in the other*; and that the *whole Parish in general* ought JOINTLY to repair the Road in Question, though it lies within *their County of Gloucester*; And they traverse that they themselves are bound *separately and exclusively* of the other Part of the Parish, to repair it.

The Replication pursues the Indictment, and takes Issue upon the Traverse.

But Mr. Selwyn insisted, in Arrest of this Judgment, That the *WHOLE Parish*, in general, are, by *Common Law*, bound to repair this Road. Therefore, as the *whole Parish* are liable of *Common Right*, the Indictment ought to have particularly shewn HOW these Inhabitants of *a Part* only of it became liable or bound to this Repair: For want of which, he argued, that the Indictment was a bad one. And he endeavoured to support his Objection upon the Authority of a Case of the King against the Inhabitants of *St. Andrew's Holborn*, concerning the mending of *Leather Lane*; which lies partly in *London*, and partly in *Middlesex*. This Case, (which was in *Easter Term 26 C. 2. 1674*;) is reported in Four different Books. In *1 Ventr. 256.* it is said, " that if a Parish &c, be indicted for not repairing of a Way, within their Precinct, they can not plead not Guilty, and give in Evidence that another, by Prescription or Tenure, ought to repair it: For, they are chargeable de communi jure; and if they would discharge themselves by laying it elsewhere, it must be pleaded." In *1 Mod. 112.* S. C. Hale speaks to the same Effect; and says, " that if you will discharge yourself, you must do it by Prescription, or ratione tenuræ, and say, that such a one ratione tenuræ, or such Part of the Parish, hath always used, Time out of Mind &c." In *Freeman 521.* S. C. Hale is reported to say, " that the Parish of Common Right, ought to repair their Highways: And if they be indicted, and plead not Guilty, they can not give in Evidence, that another Parish or Person, or Part of that Parish ought to repair it; nor any Thing else, but that it is in Repair: For, not Guilty, goes only to that. And if another ought to repair, it should be pleaded specially. BUT if a particular Precinct of a Parish, or a particular Person, be indicted for Repair of a Highway, it must be said in the Indictment, HOW THEY COME to be chargeable; viz. either by Prescription, or ratione naturæ." Kebble's

Account

Account of the same Case, in his 3d Vol. p. 301. is this—On an Indictment of the Inhabitants of St. Andrew's in London, on Prescription “that they have used to repair Leather-lane, that Part that is in Middlesex;” HALE Chief Justice said, that on *not Guilty*, nothing but the Decay is in Question; and if any other Inhabitants used to repair, it must be specially pleaded, and fetched off by another Indictment by the Inhabitants of London against Middlesex. 2. The Indictment, as at Common Law, of the whole Parish, makes both that in London, and that Part in Middlesex contributory: And, to charge the particular Inhabitants in London or Middlesex, or particular Precinct, the Indictment must be *ratione naturæ*, or by Prescription, and not *de communi jure*, to exempt the rest of the Parish. *Ex motione Twysden*, for a Day to plead.

From this Case, Mr. SELWYN inferred, that this being an Indictment of only a *Particular Part* of the Parish, and *not of the whole Parish*, it ought to have shewn how that particular Part came to be bound to repair; when the Obligation to repair this Road lay, of *Common Right*, upon the *whole Parish*, and *not upon any particular Part of it*.

Mr. Justice YATES and Mr. Justice ASTON, the only Two Judges then in Court, were not satisfied with this Case, thus imperfectly reported by all these Reporters; and could hardly think, that Lord Chief Justice HALE had said what he was represented to have said. Besides which, they observed, that the present Indictment is *not* against a Precinct of a Parish, or a particular Part of a Parish lying all in the same County: But it is against the *whole* of the Parish, which lies within *that County* where the Indictment is found.

However, they gave him a RULE to shew CAUSE.

THE Gentlemen who now shewed Cause, said that Parish and Vill were synonymous. *Cro. Jac. 163. Sir William Wrey v. Vesper.* 1 Mod. 250. *Addison v. Sir John Otway.* 1 Inst. 125.

It appears by the Case of *Mile-End* within the Parish of *Stekneth*, in *Style 163*, that though a Hamlet within a Parish can't be charged of Common Right to repair a Highway, yet a Vill may.

It is impossible for any Common-Law Process directed to the Sheriff of one County, to be enforced by him in *another County*: His Viscountiel Jurisdiction extends no further than his own County. This Parish lies in Two Counties. In the *Mile-End* Case, both Parts of the Parish lay in *Middlesex*.

It was replied by Mr. *Auburst* and Mr. *Selwyn*, on behalf of the Defendants, that the Parishes lying in different Counties can not alter the Law. Here, only *Part* of the Parish are indicted, and generally charged as liable, without shewing *how* or *wby*. If Parish and Vill are synonymous Terms, then only *Part of the Vill* is indicted: Whereas it ought to be the *whole Vill*. But this Indictment expressly terms them “*Part of the Parish*.” Therefore, upon the Principles of the Common-Law, Judgment ought to be arrested.

LORD MANSFIELD thought, this Case stood clear of all Precedents and Acts of Parliament; and that it was to be determined upon Principles; no Common-Law Case having been produced, where the Parish lay in two different Counties, and only Part of it generally indicted. There must always have been Obligations upon Parishes, to repair their Highways.

This Part of the Parish here indicted is not a particular Precinct: It is the *whole* of the Parish that lies *within* this County of *Gloucester*; and it might have been laid so. The Indictment must be confined to the County. The old Jurisdiction of Counties was local: They were like different Kingdoms. There was no Jurisdiction out of the County; no Proces, out of it. The whole of the Parish that lay within a County was liable to repair the Road lying with the County. Where County-Bridges stand in different Counties, one Part of the Bridge can’t stand, without the other Part: And therefore both Counties shall, by Act of Parliament, be contributory. But that is not the Case of Roads.

This Indictment seems reasonable and right; and is, in my Opinion, a good One.

His Lordship spoke very slightly of the confused Note of the Case of *St. Andrew's Holborn*, in *Keble* 301.

Mr. Justice *YATES* concurred with **LORD MANSFIELD**, that this Indictment was a proper One; and he even added, the *only* proper One that could be brought.

This is agreeable to the general Obligation that Parishes are under, to repair their Highways. This is the *whole* of the Parish that lies in the County of *Gloucester*: And they are under a general Obligation to repair that Part of the Road which lies in the County of *Gloucester*: Here is no particular Obligation by Prescription, or Tenure, or otherwise: Nor any Thing relating to a Vill, or a particular District. The Indictment of the Inhabitants of *St. Andrew's Holborn* is said by *Keble*,[§] to have been on Prescription “that they have used ^{§ p. 301. of} *3 Keble*.

" used to repair Leather-Lane, that Part that is in Middle-
" sex."

As the Parish lies in two Counties, an Indictment against the whole Parish, found in One of the Counties could not have been enforced : One County has no Jurisdiction over the Inhabitants of a distinct County.

Mr. Justice WILLES was of the same Opinion with the Lord Chief Justice and Mr. Justice YATES.

† N. B. Mr.
Justice As-
ton was
absent; be-
ing engaged
in his new Office of One of the Lords Commissioners of the Great Seal,

Per + CUR'. unanimously—

RULE DISCHARGED.

Thursday
25th Janu-
ary 1770. Goodright, on the Demise of Glazier, *versus*
Glazier.

THIS Cause had been tried at the *Suffex-Affizes*: Where a Verdict had been given for the Plaintiff, the Heir at Law to the Testator, against the Defendant, who was his Devisee in two Wills.

It now came before this Court, upon a Motion on the Part of the Defendant for a new Trial: Which was opposed by Mr. Dunning (Solicitor-General,) Mr. Burrell, and Mr. Kemp, on the Part of the Plaintiff; who argued, that *both* Wills were revoked; and, consequently, their Client took as Heir at Law.

The Question turned upon the Revocation of the *first* Will, *by making the Second.*

The Short of the Case was this.—The former Will (being a Will of Lands) was made in 1757: The Second, in 1763. The former was never cancelled: The second was cancelled by the Testator himself. Both Wills were in the Testator's Custody, at the Time of his Death: The second, cancelled; the first, uncancelled.

The Counsel for the Plaintiff, the Heir at Law, argued, That the second Will was a complete Instrument, at the Time when it was executed; That it clearly proved the Testator's Intention of revoking the former; And that the Execution of it was as much a Revocation of the former, as if he had thrown the former into the Fire; That the Preservation of it was merely accidental, and of no Consequence; That it had

had been already totally extinguished, so that it could never revive; That, as it never had been republished, it remained a mere Nullity; And that no subsequent Event could hinder the Execution of the second Will from operating as a Revocation of the former. The second Will was therefore the Testator's only subsisting Will, so long as it remained uncancelled. And when he thought fit to cancel and destroy it, it is manifest that he meant to die intestate, and that his Heir at Law should take. If a Woman makes a Will, and then marries, her prior Will is thereby revoked; and shall remain so, although she should immediately become a Widow. They cited a Case of *Ashburnham and Bradshaw*; and also the Case *ex parte Hellier*, 3 Atkyns 798. where Sir George Lee gave Sentence "that the Execution of a second Will is a Revocation of a first, though the second be afterwards cancelled; " and that the cancelling the second did not set up the first :" Which, they said, was the same Point, only that it was personal Property. Mr. Dunning said, he had inquired into that Case: And it was affirmed by the Delegates. They denied the two Cases of * *Eggleston v. Speke*, * Carthew and † *Onions v. Tyrer*, to be like the present Case. The former 79. 1 Show. is only, "that a second Will shall not revoke a first; if the 89. 3 Mod. second is not good in Law, but void. The latter is, that 259. † *Pere Williams*, "a second Will, devising Lands to the same Person, and re-voking all former Wills; and this second Will subscribed 343. by Three Persons but not in the Testator's Presence, shall not revoke the former Will, so as to let in the Heir at Law." They insisted, that the Statute of Frauds does not alter any of the old Requisites of Revocation, except in the Cases therein excepted. † *The same Liberality*, they said, † Vide 29 C. ought to prevail in the Revocation of Wills, as in the making 2. c. 3. sect. of them: And the true Principle of the Cases upon Revocation 6. and post. of Wills, both before and since the Statute of Frauds, P. 25¹⁴, 2515. is the *Alteration of the Testator's Intention*. 1 Roll's Abr. 614, 615, 616.

Mr. Serjeant Leigh was beginning to speak on the other Side; but was prevented by LORD MANSFIELD, as the Case was so plain as to render it unnecessary for the Serjeant to proceed.

HIS LORDSHIP observed, with regard to the Case *ex parte Hellier*, in 3 Atk. 798. that Mr. Atkyns only reports what passed in Chancery. There might be other Circumstances appearing to the Ecclesiastical Court, which might amount to a Revocation of a Will of personal Estate.

Here, the Testator has, by both Wills, devised the Lands in Question, to the Defendant. His cancelling the second is a Declaration "that he does not intend that to stand as his Will." Does not that speak, "that his first Will shall stand?"

If he had intended to revoke the first Will, when he made the second, it must have operated as a Declaration "that the "Defendant should *not* take." But that could not be his Intention; because he devises to the Defendant by *both*.

As to Cases of Revocation of Devises of Land, contrary
 *Vide ante, to the Intention of the Testator, (as the Case of The Earl of
 p. 1690. Lincoln, and many more,) they turned upon legal Subtilties.
 accord. They have been determined; and therefore must govern all
 similar Cases: But none of them are applicable to the present
 Question.

Here, the Intention of the Testator is plain and clear. A Will is ambulatory till the Death of the Testator. If the Testator lets it stand till he dies, it is his Will: If he does not suffer it to do so, it is *not* his Will. Here, he had two. He has cancelled the second: It has no Effect, no Operation; It is no Will at all, being cancelled before his Death. But the former, which was never cancelled, stands as his Will.

Mr. Justice YATES concurred with LORD MANSFIELD, for the same Reasons. A Will has no Operation, till the Death of the Testator. This second Will never operated: It was only Intentional. The Testator changed his Intention; and cancelled it. If by making the second, the Testator intended to revoke the former, yet that Revocation was itself revocable: And he has revoked it. In the Case of *Onions v. Tyre*, there was no Intention to die intestate: And therefore the Heir at Law was not let in. Hellier's Case might be rightly determined: There might be *collateral* Evidence of an Intention to revoke. That was a Will of *personal* Estate.

† Vide § 6. By the Statute of Frauds, † "No Devise in Writing, of
 "Lands, Tenements or Hereditaments, or any Clause there-
 "of, shall be revocable, otherwise than by some other Will
 "or Codicil in Writing, or other Writing, *declaring the*
 "same; or by burning, cancelling, tearing, or obliterating
 "the same, by the Testator himself, or in his Presence and
 "by his Directions and Consent: But all Devises and Be-
 "quests of Lands and Tenements shall *remain and continue in*
 "force, until the same be burnt, &c.; or unless the same be
 "altered by some other Will or Codicil in Writing, or other
 "Writing of the Devisor, signed in the Presence of Three
 "or Four Witnesses, *declaring the same.*" Now here are
 none of these Circumstances used in what is pretended to be
 a Revocation of this first Will. Therefore the *first* Will
 stands good.

Mr. Justice WILLES declared the same Opinion; and gave the same Reasons; particularly repeating the Clause in the

the Statute of Frauds concerning Revocations: Which shewed, he said, that this is no Revocation.

Mr. Justice ASTON was in Chancery, as One of the Lords Commissioners.

LORD MANSFIELD mentioned a Cause at the Delegates, between *Mason v. Limbrey*; where the Testator Samuel Mason had made his Will, of his Real and Personal Estate; and properly executed two Duplicates of it: One of which Duplicates he kept in his own Hands; the other he delivered to Mr. Limbrey. A little before his Death, he greatly altered and obliterated his own Duplicate; and begun to write over a new Will, but never finished it: Nor did he ever apply to Limbrey, to get back his Duplicate. Sentence was given for the Duplicate of the first Will remaining in Mr. Limbrey's Hands: For, the imperfect Sketch of the unfinished second Will was no Revocation of the first. He did not mean to die intestate. So, in the Case now before Us; If this second Will is not the Testator's Will, it is no Revocation of the first: He did not mean to die without any Will at all.

Note—This Case of *Hide v. Mason* was 25th of November, 1734; and is published, from a MS. Report, by Mr. Viner, in his 8th Volume, Title "Devise," p. 140. pl. 17.

THE RULE for a new Trial was made absolute:
And it was without Payment of Costs.

Rex *versus* Abraham Head and Four Others,
Freemen of Helston.

Friday 26th
Jan. 1770.

T HIS was a Question concerning the Validity of a Corporation-*By-Law*.

It came before the Court, upon a Motion made (on Wednesday the 8th of November, 1769) by Mr. Dunning, Solicitor-General, on behalf of the Prosecutor, for a Rule upon the Defendants, to shew Cause why Judgment of *Ouster* should not be entered *against* them, notwithstanding that all the Issues had been found for them.

He said, it appeared upon the whole Record, "that the Defendants had not a good Title:" And in such Case, there shall be Judgment of *Ouster* against them, although the particular Issues may all be found for them.

This Information charges them with usurping the Office of Burgesses and Freemen. They justify under a *By-Law*. This By-Law was made by the Mayor and Aldermen, with the Assent of the Commonalty; and ordains "that the Mayor and Aldermen, by themselves, and without the Commonalty, may for the future elect Burgesses and Freemen?" And they shew that they were elected under it, *by the Mayor and Aldermen only*. Whereas the *Charter* places the Election of them in the Mayor Aldermen AND COMMONALTY. This By-Law was given in Evidence upon the Foot of Usage: And no contrary Usage was shewn. But it is not in the Power of a Corporation, to exclude any One constituent Part of their Body, to whom the *Charter* has given the Right of Election: They can't put it into the Hands of two constituent Parts of their Body only, when the Charter has placed it in three.

The Information set forth, That the Burrough of *Helleston alias Helston* in Cornwall is an ancient Burrough; and the Burgesses thereof incorporated by the Name of the *Mayor and Commonalty* of the Burrough of *Helleston* in the County of Cornwall; and that within the said Burrough there are and ought to be, and for and during, &c. there have been or ought to have been, a Mayor, Four Aldermen, and an indefinite Number of Burgesses and Freemen; and that the Office of a Burgess and Freeman is a public Office, &c.: And that *Abraham Head* late of &c. *William Pasmore*, *Thomas Nicholls*, *John May*, and *John Odgers*, late of &c. on the 1st Day of January, 2 G. 3. and from thence continually afterwards, and to the Time of exhibiting this Information, have and Each of them severally hath used and exercised and still do and Each of them doth there severally use and exercise the Office of a Burgess and Freeman, without any legal Warrant &c.; and claim, without any legal Warrant, &c. to be a Burgess and Freeman, &c.

THE PLEA of the said *Abraham Head*, *William Pasmore*, *Thomas Nicholls*, *John May*, and *John Odgers*, admitted that the said Burrough is an ancient Burrough; and that the Burgesses are One Body Corporate and Politic by the Name of the *Mayor and Commonalty*; and that within the said Burrough there are or ought to be, and for and during &c. there have been or ought to have been, a Mayor, Four Aldermen, and an indefinite Number of Burgesses and Freemen; and that the Office of a Burgess and Freeman is a public Office &c.

But the said Defendants say, that the Burrough of *Helleston alias Helston* aforesaid is and from Time immemorial had been an *ancient Town and Burrough*; and that the Lady *Elizabeth* late Queen, &c. by her Letters Patent dated the 26th of

of January 27 Regni, (reciting, " that the Burgeesses and
" Inhabitants of the said Borough of *Helleston*, from Time
" whereof &c, had had and enjoyed divers Customs &c,
" as well by Prescription as by Letters Patents, Charters, &c;
" and also, that the Burgeesses and Inhabitants of the same
" Burrough had besought her to create them into a Body
" Corporate &c,") taking it for granted, " that the said
" Burrough or Vill was an ancient Burrough and One of
" her most ancient Burroughs within her Dutchy of *Corn-*
" *wall*," did by her said Letters Patent GRANT, That the
said Burrough or Vill of *Helleston* should be and remain for
ever a Free Burrough : and that the Burgeesses of the said Bur-
rough should be incorporated by the Name of *Mayor and Common-*
ality of the Burrough of *Helleston*; and did create them a
Body Corporate and Politic &c; and that by that Name they
should have perpetual Succession, and might have possess and
enjoy &c; and did nominate and constitute &c *Peter Collyns*,
an honest Man, and an Inhabitant of the said Burrough, to
be the first and modern *Mayor*, to execute the said Office
until *Sunday* next before the Feaste of *St. Michael the Arch-*
angel next following, and from thence until another Person
should be elected and sworn into that Office; and did Grant
to the said Mayor and Commonalty &c, that for ever there-
after, from Time to Time, there should be *Four Men*, of
the most discreet honest and quiet Men &c, to be aiding
and assisting to the said Mayor; who should be *Aldermen*,
and who, together with the Mayor, should be the *Common*
Council of the said Burrough, for the MAKING STATUTES
&c by them or the Major Part of them, without the Mayor
of the same Burrough; and did thereby nominate *J. P.* alias
R. J. *J.* alias *W. T. P.* and *P. A.* Inhabitants of the said
Burrough, to be the first and modern *Four Aldermen* of the
same Burrough, and to be, upon their Oath, corporally to be
taken before the said modern Mayor, the *Common Council* of
the said Burrough, with the said Mayor; and the said Mayor
and Aldermen for the Time being, did create the *Common*
Council, for ever; and did thereby grant to the said Mayor
and Commonalty and their Successors, that the said Mayor
and Commonalty for the Time being, together with the Alder-
men for the Time being, or the major Part of them might
elect and admit so many of the more discreet honest and quiet
Men and Inhabitants of the same Borough, to be *Burgeesses*
and *Freemen* thereof, as to them should seem fit and conve-
nient: And as by the said Letters Patent remaining &c, may
appear &c. Which said Letters Patent on the 1st Day of *Fe-*
bruary in the said 27th Year of Queen *Elizabeth*, the then
Burgeesses of the said Burrough of *Helleston* accepted; and by
Virtue thereof have from thenceforth hitherto been and still
are One Body Corporate and Politic &c, by the Name of
Mayor and Commonalty of &c. And they further say, that
after the accepting the said Letters Patent, and long before
their

their Election, to wit, on the 2d of February 27 Elizabeth at &c, the then MAYOR AND ALDERMEN of the said Burrough, and then being the Common Council of the said Burrough, WITH THE iASSENT OF THE COMMONALTY of the said Burrough, did make a certain reasonable Statute A& Ordinance, commonly called a BY-LAW (not now extant in Writing) for the avoiding of popular Confusion in the Election of Burgesses and Freemen of the same Burrough ; whereby it was ordained, " That the Mayor and the Aldermen or " the major Part of the said Aldermen of the same Burrough, " for the Time being, by themselves, and WITHOUT the " Concurrence or Assistance of the COMMONALTY of the " said Burrough, might and might be able, at all future " Times for ever thereafter, to elect and admit such and so " many of the more discreet honest and quiet Men, and In- " habitants of the same Burrough, to be BURGesses AND " FREEMEN of the same Burrough, as to them should from " Time to Time seem fit and convenient :" To which said BY- LAW the Mayor and Commonalty of the said Burrough of Helleston have, from the making thereof hitherto, conformed themselves ; and the same still is in full Force, in no wise reversed repealed or annulled.

And the said Defendants further say, that afterwards, to wit, on the 14th of November 1749, at the Burrough aforesaid, John Williams Esq. then Mayor, together with the major Part of the Aldermen of the said Burrough, did elect and admit them the said Defendants (then and there being of the most discreet honest and quiet Men, and Inhabitants of the said Burrough) to be Burgesses and Freemen of the same Burrough : And thereupon, they did, on the same Day and Year last aforesaid, take upon themselves, and Each of them did take upon himself, the Office of a Burgess and Freeman &c : and by reason of the Premisses, they and Each of them were, and still are &c ; And by that Warrant they and Each of them have and do use exercise and claim &c, as it was and is lawful &c. They conclude with traversing the Usurpation, and praying Judgment.

THE REPLICATION, protesting " that the Plea and Matter contained in it are not sufficient to Bar &c," denies that Queen Elizabeth made any such Letters Patent as in the Plea is alledged : And Issue is joined thereon. It denies the Acceptance of the Letters Patent, as is alledged in the Plea : And on this, a Second Issue is joined. It denies the making any such By-Law, by the Mayor and Aldermen, and then being Common Council &c, as by the Plea is alledged : And on this, a Third Issue is joined. It Denies the Election of the Defendants to be Burgesses and Freemen, as by the Plea is alledged : And on this, a Fourth Issue is joined. It Denies

Denies their being *Burgeesses and Freemen*, as by the Plea is alledged : And on this a Fifth Issue is joined. It Denies their being *Inhabitants at the Time of their supposed Election*, as by the Plea is alledged : And on this, a Sixth Issue is joined.

ALL these Issues were found for the Defendants.

Mr. Serjeant Burland, Mr. Morton, Mr. Wallace, Serjeant Glynn, and Mr. Hodgekins now shewed Cause against this Rule which had been obtained by Mr. Dunning.

They insisted, that this is a *good By-Law*, on the *Face of the Plea*. The Prosecutor might have demurred to it, if he had thought fit. He has not demurred : And a Verdict is found for the Defendants.

The Commonalty may give up their own Rights, by a *By-Law*, as well as by accepting a new Charter. Here, they have given up their own Rights, for the sake of Peace, and to prevent popular Confusion. They have only narrowed the Number of *Electors*. No Body is injured. It can affect none but themselves : And they have assented to it. No Violence is done : because it is by Consent. *CONSENT* is the Ground upon which it stands : And that *Consent* makes it a *good By-Law*.

They cited the following Cases. The Case of Corporations, 4 Co. 77, 78. to shew that a *By-Law* which restrains the Number of Electors, may be good : Which was confirmed, as they said, by 4 Inst. 48, 49. in all other Cases except that of Electing *Burgeesses* to Parliament. The Case of the Corporation of Colchester, 3 Bulstrode 71. By Coke Chief Justice and the Whole Court, " If there be a popular Election of the Mayor and Aldermen, in Corporation-Towns ; " and this happens to breed a Confusion among them ; this " may be altered by their Agreement, and by the common " Consent of all, to have their Elections made by a fewer " Number ; but not otherwise : But if by their Charter they " are to be elected by them All, then this is not to be alter- " ed but by and with the general Assent of the whole Town ; " and so, by this means, to take away Confusion." They also cited 1 Salk. 168. 1 Salk. 190, 191. *Butler v. Palmer*. Andrews 119, 241. *The King against Castle*. Jenkins's Centuries 273. Case 93. The Carmarthen Case, *Rex v. Philips*, in Trinity Term 1749 : and the Maidstone Case, *Rex v. Spencer*, in Hilary 1766 : Both of which last cited Cases may be seen *ante*, Vol. 3. p. 1833 and 1836.

It was replied, by Mr. Dunning and Mr. Thurlow, on behalf of the Prosecutor, that this *By-Law* could not be supported.

This

This Corporation consists, by the Charter, of *Three integral Parts*; the Mayor, the Aldermen, the Commonalty. The Charter gives the Right of Electing and Admitting Freemen and Burgesses, to *All Three*. This By-Law, (a non-existing One, inferred only by a Proof from Usage,) excludes *One of the Three integral Parts*, the Commonalty. It contravenes the fundamental Principles of the Constitution: Which it is *not in the Power of the Corporation* to do. They can't exclude an *integral Part* from the Right of Electing, by a By-Law of their own, without the King's Concurrence; even though the whole Body should assent to it. It is not true, "that no Body is interested in this, but *Themse'ves*" The King and the Public are interested. It is not like a private personal Right given to a Man for his own private Benefit; and which he may therefore renounce without Detriment to any One else, or at all affecting any One but himself. Nor is it like those Cases where the Right of Election is given to a *whole Class*, and they consent to be bound by the Acts of a *Part of themselves*, by a *Select Number* of their *own Body*. This is not inconsistent with the Principles we insist upon; and their Cases prove no more than this, "that where the Right of Election is given to a *whole Class of Men*, "they may restrain it to a *Part of themselves*." But a Corporation can't change their Constitution, and give themselves a new Mode of Existence. They cannot narrow the Number of those *out of whom* the Election is to be made: Nor can they leave out an *integral Part* of those who are to *elect*: though they may narrow their Number. They cannot superadd Qualifications not mentioned in the Charter, and not connected with the Corporate Character of the Electors. The Crown has given them a Charter: They have accepted it. They must use it, *as* the Crown have given and *as* they have accepted it. They cannot make a By-Law contrary to its Intention. To prove these Positions, they cited the *Maidstone Case*; which is reported *ante*, p. 1827, to 1840. by the Name of *Rex v Spencer*, and again, (a Sort of second Part to it) in this present Volume, p. 2204, to 2208. by the Name of *Rex v Cutbush*.

As to the *Commonalty's giving up their own Rights* by this By-Law, it was observed by Mr. Thurlow, that *their Assent* to this By-Law can have no *Effect* whatsoever: It is null and void, and cannot bind their Successors. The Power of *making By-Laws* is given, by the Charter, to the *Mayor and Aldermen ONLY*: The *Commonalty* have no Authority to interfere at all in that Matter. It is not within *their Province*: They could not be summoned for such a Purpose; nor, if they were summoned, could they do any single Act that could be valid, in Relation either to the *Making By-Laws*, or assenting to or dissenting from them. All their Acts of that Kind

Kind would be nugatory, null, and void ; as they have no Sort of Power to meddle therein. Consequently, This By-Law is to be considered as made by the Mayor and Aldermen alone : And the Addition of the Words “ *with the Assent of the Commonalty,*” makes no Difference, nor carries any real Meaning ; because they had no Concern in what was transacted, any more than any other Person, or even an absolute Stranger to the Corporation.

LORD MANSFIELD stopt Mr. Thurlow ; and said—
The Body at large had no Power to make By-Laws ; because that Power is, by the Charter, given to the Common Council, consisting of the Mayor and Aldermen : And the Common Council could not, by a By-Law, take away from the Body at large the Right of Election which the Charter had vested in the whole Body.

This is exactly the Case of *Maidstone.* *

*Vide ante,
vol. 3. p.

The whole of the present Case is shortly this. *The Charter* 1834, 1837, of Queen Elizabeth gave the Power of Making By-Laws, to 1839, 1840. the Mayor and Aldermen ; and granted the Power of electing Burghesses, to the Mayor or Aldermen AND COMMONALTY. An Information in Nature of a *Quo Warranto* is brought against the Defendants, who plead a By-Law, not now extant in Writing, made by the Mayor and Aldermen, WITH THE ASSENT of the Commonalty, “ that the Mayor and Aldermen, or the major Part of them, might elect Burghesses and Freemen, WITHOUT the Concurrence or Assitance of the Commonalty of the said Burrough :” And they add “ which said By-Law the Mayor and Commonalty of the said Burrough have, from the making thereof hitherto, conformed themselves.”

Several Issues were taken upon this By-Law and the Defendants Title under it : Which were all found for the Defendants.

But the Prosecutor moved for a Rule to shew Cause “ why Judgment of Ouster should not be entered.”

Upon shewing Cause, The Counsel have gone into a very long Argument at the Bar ; and great Stress has been laid upon the Allegation “ that the By-Law was made WITH THE ASSENT of the Commonalty.” But the Judgment turns upon a very short and clear Point.

THE COURT directed that JUDGMENT of Ouster should be entered, But I had Directions, not to tax any Costs of the Trial.

Mr. Justice ASTON was absent; sitting in Chancery as One of the Lords Rex Commissioners.

Wednesday
31st Jan.
1770.

* c. 546

Rex *versus* Micklethwayte.

THE Defendant had been convicted before Five Trustees appointed for putting in Execution the Powers contained in an Act of Parliament made in 32 G. 2 * for repairing and widening the Road from *Dewsbury* to *Ealand* in the West Riding of the County of *York*, of an Offence against that Statute ; whereby he forfeited Five Pounds. He appealed to the Quarter-Sessions : And they confirmed the Conviction ; *subject to the Opinion of the Court of King's Bench*, upon the Facts stated in the Order of Sessions.

These Orders had been removed hither by *Certiorari* : And the Conviction stood in the Crown-Paper, for Argument.

Mr. Fenton, for the Prosecution, objected “ that the *Certiorari* ought not to have issued ; the Act of Parliament having expressly excluded the Jurisdiction of this or any other Court of *Westminster hall*. ” And upon referring to the Act of Parliament, his Objection appeared to be well founded. He cited the Case of *The King against Wakefield and Others*, Hil. 31 G. 2. B. R. * where the Writ of *Certiorari* was superseded, *quia improvidè emanavit* ; the Return taken off the File ; and the Order remanded.

Vide ante, and Others, Hil. 31 G. 2. B. R. * 488, 489. Mr. Fearnly contra, for the Defendant said, it was by Consent of both Sides, that the Sessions had stated the Case specially and referred it to the Opinion of this Court : And after such Consent, it was regular and allowable to proceed here.

Mr. Fenton denied that there was any such Consent : And Mr. Fearnly was not able to make it out, to the Satisfaction of the Court.

¶ Mr. Justice ASTON was of Opinion that they were excluded by the Clause which takes away the *Certiorari*, and fitting in the Court of Chancery. They made the like Rule as they had done in the Case of *Wakefield and Others*, (Vol. 1. p. 419.) namely,

That the Writ of *Certiorari* be superseded, *quia improvidè emanavit* ; the Return taken off the File ; and the Orders remanded.

Rex

Rex *versus* William Rogers, Burges of Helston.

UPON shewing Cause why an Information in Nature of a *Quo Warranto* should not be granted against the Defendant, to shew by what Authority he claimed to be a Free-man and Burges of that Corporation, The Question was Whether this Case was or was not *within the Rule and Resolution* settled and established in the *Winchelsea Causes*, (*Vide ante*, 19⁵², 1963,) of not granting Informations of this Kind against Corporators, *after Twenty Years unimpeached Possession* of a Corporate Franchise : But that every Case *within Twenty Years* should depend upon its own particular Circumstances.

The Counsel for the Defendant insisted that the Prosecutor was too late in his Application; and that the Defendant was intitled to the Benefit of the abovementioned Resolution, "that "Twenty Years was the *ne plus ultra*, the utmost Limit, "beyond which the Court would not interfere to disturb the "peaceable Possession of a Corporate Franchise."

The FACTS of the present Case were very short and clear. The Defendant was *elected* into the Office, on the 14th of November 1749 : The original Motion made against him, for a Rule to shew Cause why this Information should not be granted, was on the 11th of November 1769; which was *Three Days before* the Expiration of Twenty Years. But the Day for shewing Cause, which was fixed in the Rule, was not till the *Thursday* next after the Octave of St. Martin: Which Day carried it *Nine Days beyond* the Expiration of Twenty Years. For, the 11th of November (*St. Martin's Day*) falling on a *Saturday*, its Octave was the 18th, and the *Thursday* next after that Octave was the 23d of November 1769. So that he would have been *above Twenty Years* in unimpeached Possession of his Office, before the Day upon which he was required to shew by what Warrant he claimed it.

LORD MANSFIELD and Mr. Justice YATES were exceedingly clear, that the abovementioned *Limitation* (of an Application for Leave to file such an Information) to the Compass of Twenty Years, precluded the Court from listening to the present Motion; and that they could not grant such Leave, consistently with the Rule they had laid down, and the true Meaning and Intention of their former Resolution.

LORD MANSFIELD observed, that this original Motion was not made till so near the Expiration of the Twenty Years,

Years, that not only the Rule could not have been made absolute within the limited Time of Twenty Years, allowing a just and reasonable Opportunity of shewing Cause against it; but that it would not be easly even to *serve* the Rule in *Cornwall*, before the Expiration of the limited Time.

Mr. Justice YATES acceded to this Observation; and held, that the Period of the limited Space of Twenty Years was the Day of the Court's granting the Information by making the Rule absolute. Now, in the present Case, the Defendant would have been Twenty Years in quiet Possession of his Office, before any Information could be granted against him by making the original Rule absolute. He did not even consider it as a *Cause in Court*, till the Rule was made absolute for an Information. For, any of his Majesty's Counsel may, without a Licence, be concerned for the Defendant, until such Time as the Information is actually granted: From whence he inferred, that it was not properly a *Cause in Court*, till the actual Granting of the Information.

Mr. Justice ASTON was not present: He was sitting in Chancery, as One of the Lords Commissioners of the Great Seal.

Mr. Justice WILLES could not, of his own Knowledge, declare what the Intention of the Court was, when they established this Rule of Limitation; as he was not, at that Time, either upon the Bench, or even a Practiser in this Court: But he seemed (though silent) to concur with his Lordship and Mr. Justice YATES.

Mr. Hodgekins, One of the Counsel for the Prosecutor, offered an Observation in his Favour, and in answer to the Objection made on the Part of the Defendant. He said, that by the intermediate *Alteration of the Style* there would be a Loss of *Eleven Days* in computing Twenty Years: Which ought to be allowed for. And if they were allowed for, then there would be Fourteen Days wanting of Twenty complete Years, at the Time when the original Motion was made on the 11th of November 1769; *viz.* Three and Eleven: And Twenty complete Years from the 14th of November 1749 would not be expired till the 25th of November 1769; before which Day, (namely, on the 23d) the Rule might be made absolute, and the Information actually granted.

But LORD MANSFIELD answered, that this was an odious Prosecution; being so exceedingly stale as it appeared to be: And he therefore thought that the Court ought not to enter into such Niceties, in order to support it.

He declared, however, at the same Time, that if the Defendant had, by enlarging the original Rule, or by any other *Delay of his own*, carried the Making it absolute beyond the limited Time; he ought not in such Case, to have been permitted to take Advantage of that Delay which he himself had been the Occasion of.

RULE DISCHARGED.

Morley *versus* Vaughan: Or the Case of Vaughan, a Prisoner.

BY the 32 G. 2. c. 28. "for Relief of Debtors with Respect to the Imprisonment of their Persons," a Debtor charged in Execution for any Sum not exceeding 100*l.* may exhibit a Petition to the Court from whence the Process issued: But he shall give previous Notice of it, in Writing, signed with his Name, to all his Creditors, "FOURTEEN *"Days at least,* before any such Petition shall be presented *"and received."*

This Prisoner (*Vaughan*) having been brought up, a few Days ago, to be discharged upon this Act of Parliament, it appeared that the Notice he had given was only Thirteen Days before he exhibited his Petition; unless the first and last Days should be, both of them, included: So that it became a Question "Whether he had given sufficient Notice, pursuant to the Directions of the Act of Parliament."

THE COURT rather inclined to the favourable Side, for the Benefit of the Prisoner and the Furtherance of the kind Intention of the Legislature. However, they thought it proper to inquire how the Court of Common Pleas acted upon the like Occasions; in order to preserve a Consistency between the two Courts. To which End, it was at that Time

AOJOURNED.

This Day, towards the Rising of the Court, and after LORD MANSFIELD, was gone, the Matter was taken up again.

Mr. Mansfield, Counsel for the Plaintiff, said that Mr. Barnes, Secondary of the Common Pleas, having been consulted, declared it to be the Practice of that Court, to require Fourteen complete Days Notice; that is to say, excluding only One of the Days.

Mr.

Mr. Justice YATES observed, that upon Returns to Writs of *Mandamus* and *Scire Facias*, the Rule was "that there must be Fifteen Days between the Teste and Return;" And yet, in Practice, there were only Fourteen; one of the first or last being always included. So upon a Supersedeas for want of declaring before the End of two Terms, one of the two Terms is always included, By Analogy, therefore, to these Instances, he thought the Court might, in Favour of Liberty, make the Computation in the present Case so as to include one of the Days.

He chose, however, to lay hold of a Circumstance which offered in the present Case; namely, that *above* Fourteen Days Notice had been given in a former Term; though nothing was done upon it, by reason of the Prisoner's not having annexed a Schedule, as he had in Reality no Effects, and had therefore omitted to annex a Schedule in the requisite Form: Upon the Discovery of which Mistake, the Prisoner gave this new Notice; having then only Thirteen Days running. Mr. Justice YATES thought this was enough to shew that there was *no Surprize* upon the Plaintiff, nor any Intention of surprizing him; though he acknowledged, that, strictly speaking, *two insufficient Notices* could not amount to *one good One*.

* Mr. Justice WILLES coming into the same Sentiment; and the Plaintiff's Attorney not disputing it;

[†] Mr. Justice ASTON
was absent
(in Chan-
cery.)

THE PRISONER WAS DISCHARGED out of Custody, as at MORLEY's Suit.

Note—This Act of 32 G. 2. c. 28. has twice before been favourably construed for the Relief of Debtors; viz. in Trinity Term 32, 33 G. 2. ante, p. 799. and in Michaelmas 33 G. 2. ante, p. 901.

Boddy *versus* Leyland.

Monday 5th
Feb. 1770.

MR. John Calendar, a Merchant, came to justify as Bail. The Sum he was required to justify in, was 9000l. And he regularly justified in that Sum, *inclusive of his landed Property in Jamaica*.

Mr. Mansfield objected to the including his landed Property in *Jamaica*.

Mr. Baker argued, that it ought to be allowed, as a sufficient Security.

Mr.

Mr. Justice YATES and Mr. Justice ASTON (who came into Court to take the Oath of Office as one of the Commissioners of the Great Seal, and afterwards remained upon the Bench) were the only Two Judges in Court. They thought the Objection a good One; because his landed Property in *Jamaica* is not liable to the Process of this Court. And upon Inquiry "whether such an Objection had ever been made," Mr. Thomas Cooper Junior recollects such an Objection to have been once made by Mr. Stowe: and that the Person was rejected.

THE SAME was therefore done in the present Case.

Rex *versus* John Wilkes, Esq.

Wednesday
7th Feb.
1770.

AS this Cause, in the several Branches of it, came several Times before the Court, it seemed better to reserve a general Account of it till a final Conclusion of the whole, than to report the particular Parts of it disjointedly, in order of Time as they were respectively argued and determined.

In Michaelmas Term 1764, the 4th Year of his present Majesty King George the Third, SIR FLETCHER NORTON, then his Majesty's Solicitor-General, (the Office of Attorney-General being then *vacant*) exhibited an Information against Mr. Wilkes, for having published, and caused to be printed and published a *sedition* and *scandalous* Libel, the *North Briton*, No. 45.)

And soon after, he exhibited another Information against him, (the Office of Attorney-General still remaining *vacant*) for having printed and published, and caused to be printed and published, an *obscene* and *impious* Libel, (an *Essay on Woman*, &c.)

Mr. Wilkes having pleaded "Not Guilty" to both these Informations, and the Records being made up and sealed, and the Causes * ready for Trial, the Counsel for the Crown thought it expedient to amend them, by striking out the Word "Purport," and in its Place inserting the Word "Tenor." The proposed Amendments were in all those Parts of the Information where the Charge was that the Libel printed and published by Mr. Wilkes contained Matters "to the Purport and Effect following, to wit? Which the Counsel for the Crown thought it adviseable to alter into Words importing that such Libel contained Matters "to the Tenor and Effect following, to wit."

Sir

Sir Fletcher Norton (then become himself Attorney-General) directed Mr. Barlow, Clerk in Court for the Crown, to apply to a Judge for such an Order; apprehending it (as he afterwards publickly declared) to be a Matter of Course.

Mr. Barlow, in Pursuance of these Directions, applied to Lord Mansfield, for a Summons to shew Cause "why such " Amendment should not be made." And his Lordship issued a Summons in each Cause, dated 18th of February 1764, for the Defendant's Clerk in Court, Agent, Attorney or Solicitor, to attend him at his House in *Bloomsbury-Square* on Monday the 20th of February at 8 o'Clock in the Morning; to shew Cause why the Information should not be amended, by striking out the Word "*Purport*," in the several Places where it is mentioned in the said Information, and inserting instead thereof the Word "*Tenor*." N. B. The Summons in the Cause relating to the seditious Libel excepted the first Place—"except in the first Place."

On Notice of this Summons, Mr. Philips Agent and Solicitor for Mr. Wilkes, and Mr. Hughes, his Clerk in Court, and Attorney for him upon the Record, both attended his Lordship, at his own House, upon the said 20th of February 1764, accordingly, (being now Vacation-Time, and no Court sitting) and did not object to the proposed Amendment: On the contrary, Mr. Hughes, upon being asked as a fair Practiser, candidly acknowledged "that it was amendable;" and Mr. Philips acquiesced in it, though he said he could not CONSENT to it. Lord MANSFIELD having, in the Presence of these Gentlemen, consulted and produced many Precedents, and being fully satisfied that the Amendment might be "made, and that it might be made by a single Judge at his "House or Chambers," told Mr. Philips "that there was no "Need of his Consent;" and immediately made the following Order—"Upon hearing the Clerks in Court on both "Sides, I do Order that the Information in this Cause be "amended; by striking out the Word *Purport* in the several "Places where it is mentioned, in the said Information, and "by inserting instead thereof the Word *Tenor*. Dated this "20th Day of February 1764."

The Orders in both Causes were exactly alike; only that the Word "except in the first Place" were added in that of the Information for the seditious Libel.

Mr. Wilkes was at this Time in France; whither he had voluntarily retired some Time before, and from whence he did not

not return till towards the Election of Members for the new Parliament, (into which he was afterwards chosen.)

The Trial came on at the appointed Time, and proceeded in the usual Manner ; Mr. Wilkes's Counsel and Agents making no Objection thereto, nor declining to enter into his Defence. Verdicts were found against him, upon both Informations : After which, Judgment was duly signed against him, in each Cause ; and Writs of Capias were awarded and issued against him, as in ordinary Cases of Convictions upon Informations for Misdemeanours.—Upon his Non-Appearance, the Proceedings were carried on to a Proclamation and Exigents : And upon his not appearing on the 5th Time of being exacted, he was, by the Judgment of the Coroners of the County of Middlesex, according to the Law and Custom of the Realm, outlawed.

On Wednesday the 29th of April 1768, (being the first Day of Easter Term 1768,) soon after the sitting of the Court, and before any Process had issued on this Outlawry, Mr. Wilkes voluntarily made his Personal Appearance in it ; accompanied by Three or Four Friends, who probably meant to become his Bail, in case of his being now admitted to Bail.

He opened with a Speech, which is already in * Print, and * It was therefore needs not to be here repeated. He took Notice, in printed in it, that the Record was altered before the Trial, by Lord Mansfield's Order : So that he was tried upon altered Papers of Facts. This he particularly complained of as being unconstitutional and illegal ; and was advised, he said, that it rendered both the Verdicts absolutely void.

Mr. Attorney-General (Mr. De Grey) prayed that Mr. Wilkes might stand committed ; as he had been convicted of printing and publishing one of these Libels, and of publishing the other ; and had now avowed himself to be the Person so convicted.

Mr. Serjeant Glynn, of Counsel for Mr. Wilkes, opposed this. He said, he had several Objections to the Outlawry ; and that, till last Night, they had expected a Fiat for a Writ of Error : But that, last Night, Mr. Attorney-General declined granting One, because he doubted “ Whether it belonged to his Office to grant it,” or “ Whether it ought not to be granted by the Lord Chief Justice.” He said Mr. Attorney-General did not refuse his Fiat, from any Doubt about the Propriety of the Application for it, or the Sufficiency of the Objections to the Outlawry : but merely from a Doubt “ to whom it belonged to allow the Writ of Error.” He said, he would propose some Errors, which he hoped would satisfy the Court that a Writ of Error ought to be

granted. They were of two Sorts: first, *Errors in Fact*: 2dly, *Errors in Law*.

1st. An Error in *Fact* was, "that Mr. Wilkes was absent and out of the Kingdom, at the Time of the Award of the Writ of Exigent."

2dly. Three Errors in *Law*. First, "That the Sheriff has returned no Proclamations" It is only said, "that he has obeyed the Writ:" Whereas he ought to have returned Particulars; that the Court might judge of them. Secondly, It is not stated in the Return of the Exigent, "that Mr. Wilkes was exacted in the County of Middlesex:" Nor is it said to be "at a County-Court." It is only said to be "at his County Court at the Three Tuns in Brook-street, near Holbourne, in the County of Middlesex:" Which is no Allegation "that Brook-street is in the County of Middlesex." And though it is said "at my County-Court," yet he might be Sheriff of Two Counties. He cited 2 Roll's Abr. 802, Title "Utlagarie, Error Utlagarie." Thirdly, No Judgment of the Coroner is here stated; But only a mere Fact, "that he was outlawed by the Coroner." In Support of which Objection, he cited 1 Brown's Entries 361. as in Point. He therefore prayed that his Lordship would grant Mr. Wilkes an Allowance of his Writ of Error, in order to his getting this erroneous Outlawry reversed. He said, it was improper at this Time to enter into any Litigation about the Validity of the Convictions upon which these Judgments are founded. Mr. Wilkes's present Circumstances under the Outlawry are more penal than the Convictions themselves. Therefore it is incumbent upon him, first to get rid of the Outlawry. And he prayed that Mr. Wilkes might be, in the mean Time, admitted to Bail.

* That Case Mr. Recorder of London (*Eyre*) on the same Side, enforced was an Outlawry for what the Serjeant had urged; and observed, that by 4, 5 W. & M. c. 18 § 4. Mr. Wilkes was not compellable to Non-Appearance. I have a Note and reversed the Outlawry without Bail, (unless otherwise of it, or ordered by the Court.) He therefore proposed, that he own taking, should either appear by Attorney, to reverse it; or give Bail And there is to prosecute a Writ of Error. And he cited Earbury's Case a Report of in this Court, in Easter and Trinity Terms 1723. 9 G. 1*. it in Forescuse.

Aland 37, and another in S Mod. 177, very bad in the 1st Edition but much mended in the late Edition of that Book.

Mr. Mansfield, on the same Side, argued that Mr. Wilkes was clearly intitled to be admitted to Bail, under this Statute. The Convictions can not at this Time be proceeded upon; as the Sentence of Outlawry is standing out against him. He has done all that is in his Power to do. He appears in Court, and

and submits to the Laws of his Country. He has shewn Error of Weight, in the Outlawry; and has used all Methods to obtain a Writ of Error to be allowed; and prays to be admitted to Bail by the Court, as he must have been by the Sheriff, if he had been taken upon a *Capias utlagatum*,

Mr. Davenport, on the same Side, spoke to the same Effect.

Mr. Attorney-General explained the Fact and the Reason of his declining to grant the Fiat for a Writ of Error. He said that upon the Application made to him on the Part of the Defendant, he directed an Attendance: Which was accordingly had. That he thought the Errors specified to him, to be a sufficient Foundation for a Fiat, in case the Party had been *in Custody*: But he could not find any Precedent for an Attorney General's granting a Fiat, when the Party was *not* in Custody. The Writ of Error was not tendered to him, he said, till last Night: And the Court was to sit this Morning. He was ready to listen to any Method that could have been shewn to be proper: But none was proposed. He added, that he thought Mr Wilkes could not be intitled to his Writ of Error, *till* he should be in Custody. He observed, that this was not an Outlawry for Non-Appearance; but an Outlawry upon and after Conviction.

Lord MANSFIELD—Here are Two Motions made, upon the Defendant's appearing Personally in Court: One, for Committing him; the Other, for Bailing him.

I am of Opinion against both these Motions.

He ought to be brought in *regularly*, upon a *Return* of the *Capias* by the Sheriff. I have no Doubt but that we might take Notice of him, upon his voluntary Appearance as the Person outlawed; and Commit or Bail him: But we are not absolutely bound to do it, without *some Reason* to excuse the going out of the regular Course.

If the Defendant could shew that the Attorney-General refused to take him up and bring him into Court, *in order to prevent* his having this Advantage; or if the Attorney-General had in Fact used all Methods to take him up, and he had concealed himself and absconded, and afterwards had come in thus voluntarily, *in order to surprize*; upon either of these, or any other *extraordinary* Ground, we should be bound to interpose, and overlook the Impropriety of the Defendant's coming, instead of being brought into Court.

But the real Cause of *this* Irregularity is the strongest Argument why we should *not* give Way to a new Mode, liable to Misconstruction, and carrying a bad Appearance. It is notorious, that the Defendant has appeared very publickly : *Why was he not apprehended?*

The Outlawry must certainly be disposed of, before you can come at any thing else : The Judgment upon the Convictions can not, *at present*, be proceeded upon.

I could wish this Gentleman had been better advised than to have come thus prematurely, with a written Speech, to justify the Crimes of which he stands convicted ; and to arraign an Order made by me.

I am very happy in having this Opportunity of explaining my Conduct in making the *Amendment* that has been mentioned. If I was wrong, I should think it more Honourable to acknowledge and rectify any Error that I should have committed, than to justify and defend it. The Application to me was, to amend the Word "Purport" into "Tenor." Mr. *Hughes*, the Clerk in Court for the Defendant, agreed it to be amendable. I recollected a Case of the like Kind, of an Amendment of an Information just before Trial : And, looking for it, I found a Collection of such Cases. After reading One or Two, Mr. *Philips*, Attorney and Agent for the Defendant, was perfectly satisfied, and desired me not to give myself any further Trouble ; but said "He *could not* "Consent to it." I said, "I did not want Consent :" I thought myself bound to order the Amendment ; and did so. I had made some such Orders before ; and I have made several such Orders since ; even in *Quo Warranto* Informations. In this Case, it made no Alteration in the Defendant's Defence. His Counsel never objected to it, nor took any Notice of it. I think it *right* and *usual*, and *as of Course* : Not but that I am open to Conviction, and ready to hear what can be said be shew that it was wrong.

Mr Justice *YATES*—If this Amendment was wrong, it will still be open to the Consideration of the Court ; although the proper Opportunity of objecting to it was *at the Trial*. In the Case of *The King against Charlesworth*, an Information for forging a Warrant of Attorney "to acknowledge Satisfaction upon a Judgment" was amended, without Costs (the Prosecutor having been admitted a Pauper,) and without giving the Defendant Leave to plead *de novo*. 2 *Stra. 871.*

As to the two present opposite Motions, one for committing, the other for bailing the Defendant ; the same Answer

serves for Both : " The Court can take no Notice of any Thing but what comes judicially before them." We can not take Cognizance of this Matter, in the Method in which it now comes before Us : We can not take judicial Notice " that this is the Person convicted or outlawed." Mr. Browne's Case in *Dyer* 192. is clear and strong, as to the Outlawry. And as to committing him upon the Convictions, that can't be done whilst the *Outlawry* is subsisting : The Outlawry must first be disposed of, before we proceed upon the Convictions. The Judgment of Outlawry suspends all Proceedings upon them. The Judgments on the Convictions would probably be Fine and Imprisonment. But it would be manifest Oppression to set a Fine upon him, when all his Effects stand forfeited to the King already : And he is already liable to Imprisonment upon the Outlawry ; from which he can never be freed whilst that stands in Force. There can't be two different Judgments for the same Offence : There can't be Judgment of Outlawry, and Judgment for the Misdemeanour likewise. In the Case of *The King and Queen against Tippin*, 1 W. & M. Salk. 494. the Defendant was outlawed upon an Information for a Misdemeanour, and fined 5000l. It was moved, on his behalf, that he could not be fined upon the Outlawry ; because, in Misdemeanour, the Outlawry does not enure as a Conviction for the Offence, (as it does in Cases of Treason und Felony,) but as a Conviction of the Contempt for not answering ; which Contempt is punished by the Forfeiture of his Goods and Chattels : And if he might be fined now, he must be fined again, upon the principal Judgment. And the * first was held to be irregular : For, the Outlawry in these Cases is not a Conviction ; this Word as appears by *Fleta* 42. " Quamvis Quis pro contumacia et " frst to " fuga utlagetur, non propter hoc convictus est de facto prin- be an Error " cipali." And there is a Case in *Bro. Abr.* Title " Ultra- of the Prefs; " gary, pl. 26. where a Man was outlawed of Felony, and and that it taken by a *Capias utlagatum*, and detained in the King's " Fine." Bench ; and divers Bills were brought against him in Custody of the Marshal : And the Court would not suffer it. For, his Body Goods and Lands are the King's ; And therefore the Plaintiff can not have the Effect of his Suit against him before the Outlawry ; But if he obtains a Pardon, the Plaintiff shall be answered. If the Defendant in the present Case had come in by Process, his Identity would have appeared. If he had come in by Record, he might have applied to be bailed, either upon the Statute of 4, 5 W. & M. c. 18. (if that Statute can be shewn to be applicable to an Outlawry on a Misdemeanour,) or under the plenary Power of the Court upon the Circumstances of his Case. But that Statute seems only to be applicable to civil Cases. I mention this, only for the Consideration of the Counsel, when it shall come before the Court. By the 5th Section, the Sheriff may " take Security " of the Defendant taken upon a *Capias utlagatum*, in Cases " where Bail is required, in double the Sum for which Bail is " required."

" required." But how can the Sheriff, under the Directions of this Statute, take Bail in *double the Sum*, in a *Criminal Case*? How can the Sheriff know what the Fine *will be*? Or why should the Sum of the Fine be doubled? The Statute seems to relate only to *civil Cases*, and to mean " *double the Debt.*"

The Defendant ought, in my Opinion, to have come hither in a *regular Way*: But as the Matter now stands, upon this voluntary Appearance, without Return of Process or any Matter of Record whatsoever, the Court, can neither commit him nor bail him.

Mr. Justice ASTON—I think there is but one Question: And I shall keep to that. It is " Whether he shall be " committed." The Attorney General prays us to commit a Man *as an Outlaw*, against whom he himself would not issue Process of Outlawry; though there does not appear to be any particular Circumstances to prevent his issuing such Process. The Officers of the Crown might have exercised their Power by proper Process: And then he would have been in Custody. But they have not chosen to do so: And he remains as much at his Liberty, as he was before he came into Court. The Motion to commit him seems unnecessary: And I shall not at present, take Notice of any other Question; he not being at all in Custody.

Mr. Justice WILLES—There has been, for some Time, a Judgment of Outlawry against the Defendant, who is not an absconding Person. The Attorney-General has not thought proper to issue Process against him upon it. And now he comes into Court *gratis*, voluntarily, not by any Return of Process, or any Matter of Record. We can not take any Notice at all of him; nor can we know, *judicially*; " that " " he is the Man." I don't see why the Attorney-General should demand of the *Court* to commit the Defendant upon this Outlawry, when he himself has long suffered him to go at large, without any Attempt to take him up, or even issuing Process against him.

NOTHING was taken by either of the two Motions; namely, the Attorney-General's, " that the De- " " fendant might be committed;" or his own Counsel's, " that he might be bailed."

On Wednesday the 27th of April 1768, (a Week after the former Transaction,) Mr. Wilkes having this Morning surrendered himself to the Sheriff of Middlesex upon a *Capias ut/latagatum* which had been since the last Motion issued against him, and being now in the Sheriff's Custody, was brought into Court by the said Sheriff, upon the Return of a *Habeas Corpus*

Corpus directed to him for that Purpose. In the mean Time, Mr. Attorney-General had granted his Fiat for a Writ of Error. Which he did immediately upon receiving an Assurance that Mr. Wilkes was in actual Custody upon the *Capias utlagatum*. The Return to the *Habeas Corpus* being read in Court, it appeared that the Defendant was charged with two Outlawries; *viz.* one on each Conviction for the respective Misdemeanours before mentioned. A Writ of Error in each Cause was delivered into Court.

The Outlawries, and the Writs of Error, and the Assignment of Errors, were exactly alike in both Causes: It will therefore be sufficient to specify only One of each Sort.

The material Part of the Outlawry, on which the Question turned, was this. The Sheriff returned the Writ of Exigent executed and indorsed as follows—"By Virtue of this Writ "to me directed, at my County Court held at the House "known by the Sign of the Three Tuns in Brook-street near "Holborn in the County of Middlesex, the 12th Day of July "in the Fourth Year of the Reign of our present Sovereign "Lord George the Third now King of Great-Britain &c. the "within named John Wilkes was the first Time exacted, and "did not appear." It goes on in the same Manner, till the "quinto exactus; viz." "at my County Court held at the "same Place the 9th Day of August in the Year aforesaid, the "said John Wilkes was a second Time exacted, and did not "appear;" And so, in the same Words, only changing the Days, to the 5th exclusive. Therefore by the Judgment of Edward Umfreville Esq. and Thomas Philips Gent. his Majesty's Coroners of the County of Middlesex, the said John Wilkes, according to the Laws and Customs of this Realm, is outlawed.

The Writ of Error was *verbatim* as follows—Of Easter Writ of Error Term 1768, 8 G. 3. OUR LORD THE KING hath sent to his son. Justices appointed to hold Pleas before him his Writ closed in these Words (that is to say George the Third by the Grace of God of Great Britain, France, and Ireland King Defender of the Faith &c. To our Justices appointed to hold Pleas before us Greeting, forasmuch as in the Record and Process, as also in the Publication of an Outlawry against John Wilkes late of Westminster, in the County of Middlesex Esquire on a certain Information against the said John Wilkes, for printing and publishing a certain Libel or Composition, intituled an Essay on Woman; whereof the said John Wilkes is impeached, and thereupon by a Jury of the County is convicted, as it is said manifest Error hath intervened, to the great Damage of the said John Wilkes, as by his Complaint we are informed. We, willing that the said Error (if any be) be duly amended, and full and speedy Justice done to the said John Wilkes in

in this behalf, do Command you, that if the said Outlawry be returned before us as hath been said: Then inspecting the said Record and Process, you Cause further to be done therein for annulling the said Outlawry as of right, and according to the Law and Custom of England, shall be meet to be done. Witness Ourselv at Westminster, the Twenty-Seventh Day of April, in the Eighth Year of Our Reign.

Assignment AND hereupon the said John Wilkes comes in his proper Person, and says, that in the Record and Process, and also in the Publication of the aforesaid Outlawry, there is a manifest Error, in this that there is no sufficient Information filed or exhibited against the said John Wilkes, whereon to ground the Process of the Outlawry aforesaid: By reason whereof, the said Outlawry is void and of no Effect or Force whatsoever. There is also Error in this, that no public Proclamation whatsoever is mentioned to have been made at any open County Court, or at any General Quarter Sessions of the Peace whatsoever, or at the Door of any Parish Church where the said John Wilkes was an Inhabitant, according to the Exigency of the said Writ of *Captas cum Proclamacione*: Therefore in that, there is manifest Error. There is also Error in this, That it is not shewn, nor does it appear by the Return of the Sheriff of Middlesex, that the Sheriff of Middlesex did *corse to be exacted* the said John Wilkes *in the said County of Middlesex, from County Court to County Court*, until he was outlawed according to the Law and Custom of England, as the said Sheriff, by the said Writ of Exigent is commanded; and that it is not shewn nor does it appear by the Return of the Sheriff of Middlesex, that the said John Wilkes was a *first, second, third fourth and fifth Time exacted at the County Court of the County of Middlesex*, as by the Law of the Land he ought to have been before he was outlawed: Therefore in that, there is manifest Error. — There is also Error in this, that in the Record and Process aforesaid, and in the Publication of the Outlawry aforesaid, it is no where expressly shewn that the Place called BROOK STREET (if any such there be) where the several County Courts are supposed to have been held, at which the said John Wilkes is said to have been exacted, is IN THE COUNTY OF MIDDLESEX, or in any or what other County. Therefore in that, there is manifest Error. There is also Error in this, that it does not appear that any Judgment of Outlawry was given or pronounced against the said John Wilkes; or, if any such Judgment was given or pronounced, in what Form the same was so given or pronounced; as it ought to have been done, in order that the Legality and Propriety of the said Judgment might have been seen and examined: But in the Record and Process aforesaid, and in the Publication of the Outlawry aforesaid, Reference and Relation only are had to some Judgment not shewn or expressed, but supposed to have been before given against

against the said *John Wilkes*. Therefore in that, there is manifest Error. Wherefore the said *John Wilkes* prays that the Outlawry aforesaid, for the Errors aforesaid and other Errors appearing in the Record and Process aforesaid, may be reversed and held for nothing ; and that he may be restored to the Common Law, and to all which he hath lost by Occasion of the Outlawry aforesaid, &c.—And *William Joinder in De Grey*, Esquire, now Attorney-General of our present Error. Sovereign Lord the King, present here in Court in his proper Person, having heard the Matters aforesaid above assigned for Error, for our said Lord the King saith, that neither in the Record and Process aforesaid, nor in the Publication of the aforesaid Outlawry, is there any Error : And he prays that the Court of our said Lord the King now here may proceed to the Examination as well of the Record and Process aforesaid, as of the Matter aforesaid above assigned for Error ; and that the Outlawry aforesaid may in all Things be affirmed.

LORD MANSFIELD—Let the Writs of Error be allowed.

HIS LORDSHIP then asked the Attorney-General, “ to what Prison he prayed that the Defendant might be committed.”

Mr. Attorney-General answered—“ To the Marshal.”

LORD MANSFIELD—Let him be committed to the Marshal.

Mr. Serjeant Glynn moved that he might be admitted to Bail, on 4 & 5 W. & M. c. 18 * which, he said, extended to * Vide § 4. Cases of Misdemeanour. He was supported by Mr. Recorder of London, Mr. Mansfield, and Mr. Davenport.

They urged the Spirit Scope and Design of this Statute, as well as the Words of it, as Arguments to prove tht it extended to Misdemeanours ; and that the Preamble and enacting Part of it do, Both of them, apply to Mr. Wilkes's Case : And they said, that even if the Words were doubtful, the Construction of them ought to be such as would be most favourable to Liberty. But these Words are express : They include all Causes, except Treason and Felony. “ For the more easy and speedy Reversing of Outlawries in the Court of King's Bench, Be it enacted that no Person or Persons whatsoever who are or shall be outlawed in the said Court, for any Cause Matter or Thing whatsoever (Treason and Felony only excepted,) shall be compelled to come in Person into, or appear in Person in the said Court, to reverse such Outlawry ; but shall or may appear by Attorney and reverse the same, except where special Bail shall be ordered by the said Court.” Cases of Misdemeanour

Misdemeanour are within the same Mischief as Civil Cases: And it extends to Outlawries after Conviction of Misdemeanours, as well as to Outlawries upon mesne Process. If the Question should take a long Time in discussing, the Defendant may be actually punished by an Imprisonment upon the Outlawry, though it should be at last reversed; or still more unjustly, in case it should afterwards appear that no Punishment ought to be inflicted upon the Convictions themselves. In civil Cases, a Pardon is of Course, upon paying the Debt and Costs: But a Defendant outlawed upon mesne Process for a Misdemeanour has no such Opportunity of getting rid of the Outlawry. He ought to have an Opportunity of putting himself in a Condition of being amenable to the Justice of his Country. Though some of the Expressions in this Statute may seem more applicable to civil Cases, yet there are general Words sufficient to take in criminal Misdemeanours. They mentioned Sir John Read's Case, and that of *Matthias Earbury* in 1723.

Mr. Attorney General (Mr. De Grey,) Sir Fletcher Norton, and Mr. Morton, on the other Side, argued that this Statute relates only to civil Cases; and not to criminal Misdemeanours. The Expressions of it relate to civil Property. It can relate only to such Cases where a Defendant can appear by

* Vide § 2. Attorney. The Preamble * says "Whereas divers Persons
" are prosecuted in the said Court of King's Bench, to Out-
" lawries for Debts, Trespasses, or other Misdemeanours;
" and there is no Reversing such Outlawries but by the per-
" sonal Appearance of the Persons outlawed: So that the
" Persons arrested upon such Outlawries, if poor, lie in
" Prison till their Deaths; but if able, it costs them very
" dear to reverse the same Outlawries." The former of
these Words relate to Property: The latter, to Actions for
malicious Prosecutions and such like. The whole relates only
to civil Suits. And as to *Earbury's Case*, they said it was
neither a direct Determination, nor any Authority in the
present Case.

Serjeant *Glynn* replied, that "Trespasses" include all other Actions not arising *ex Contractu*: And "Misdemeanours" must mean Offences. "All Causes, Matters, and Things," certainly include criminal Offences and Misdemeanours. And the Statute speaks of Outlawries in general. It is not reasonable, that the Defendant should undergo the Penalty of a Contempt for withdrawing from Justice, when the very Validity of the Outlawry itself is in Question. And *Earbury's Case*, though it was not an Outlawry after Conviction (as this is,) yet clearly proves "that this A&t does relate
" to Misdemeanours:" For, the Judges were all of that Opinion.

LORD MANSFIELD—God forbid that the Defendant should not be allowed the Benefit of every Advantage he is intitled to by Law.

It is to be considered, *how* he is in Custody.

After Conviction, if he had been present in Court, he might have been committed : If not present, he might have been taken by a *Capias*.

It is, indeed, in the Discretion of the Court, to bail a Person so circumstanced.

But *Discretion*, when applied to a Court of Justice, means *found Discretion guided by Law*. It must be governed by Rule, not by Humour : It must not be arbitrary, vague, and fanciful ; but legal and regular.

This Defendant was not present, when convicted. He afterwards withdrew from Justice, and was outlawed : And a *Capias utlagatum* has now issued ; and he is in Custody upon it.

If a person convicted be taken upon a *Capias pro Fine*, he is liable to be committed, unless the Prosecutor consents to his being bailed. This is the common Course of Proceeding ; though it is usual to admit to Bail, upon the Prosecutor's consenting to it. In the Case of the Journeymen Taylors, and again in that of the Weavers, the Defendants were by Consent bailed, and by Consent were not to appear till called upon. But I do not remember any Case where such a Person has been bailed *without* Consent. When a Person so convicted is committed, such Commitment shall be taken into Consideration by the Court when they come to pronounce their Sentence upon him, and shall go as *Part of his Punishment*.

Here, the Defendant is in Custody under the Conviction : For, he is in Custody upon the *Capias utlagatum*, which issued upon his Conviction.

Now, whatever Doubts there may be about what *is* within the Act of Parliament of the 4 & 5 W. & M. c. 18. it is most certain that a Person convicted of a Misdemeanour is *not* within it ; because his Case is *not a bailable Case*. Nothing therefore can be clearer, than that such a Person is not within an Act of Parliament that relates only to bailable Cases. This Act relates to Cases where no special Bail is required, and to Cases where special Bail is required :* And * Vide § 5. the

the Sheriff is directed what to do in either Case. Where the Case is bailable, the Defendant is to be discharged upon the Security Bond. But even in *civil Actions*, he could not be bailed, where he was not bailable: He is only to be put into the same Condition as if he had not been outlawed at all. If the Outlawry was after Judgment in Debt, or any other civil Action, and the Defendant was *not bailable* before the Outlawry, the Act did not make such Defendant bailable, who was not so before the Outlawry. I am clear, that this Case is *not* within the Act.

Mr. Justice YATES was also clear in the same Opinion. It is said, "that Misdemeanours of *all* Kinds are within the Words of this Act, as well as within the Scope and Mean-
* Vide § 2. ing of it." But Misdemeanours are here * connected with *Debts* and *Trespasses*; which are Descriptions of *civil Actions*: And so may the Word "*Misdemeanour*" be. This Act might, in the general Words of the Preamble, have a View to Actions of Conspiracy, Deceit, or popular Actions upon Penal Statutes; (on which an Outlawry was given by 21 Ja. 1. c. 4.) And taking the Whole of the Act together, there can be no Doubt about it: For, it must be construed of those Cases where the Clauses of the Act are *practicable*; Which, in the present Case, they are *not*. A Conviction in a *criminal Case* can not be within this Act. The Sheriff is directed by it, "to take Security of the Person outlawed, in the Penalty of double the Sum for which special Bail is required." But the Sheriff can't take Bail of a Person after his being *convicted of a Crime*. The Sheriff can't form his own Idea of the *Offence*, or settle a *Sum* wherein he should take the Bail of such a Person: Nor can he require Bail in *double* the Fine, or any Thing more than what the Fine shall be fixed at; which is uncertain and future. The concluding Words of the Security-Bond, "and to do and perform such Things as shall be required by the said Court," mean putting in Bail to a new Action, pleading within a limited Time, putting the Plaintiff in the same Condition, and such like Matters. And it should be considered, how the Law stood in *civil Cases*, *before* this Act of Parliament; and that no Bail could then be taken on a *Capias ultagatum*. *Vide* 13 C. 2. stat. 2. c. 2. § 4.

What I have been saying, may throw *some Light* upon this Act of Parliament. But I confine my Opinion, to its being an Outlawry *after Conviction in a Criminal Case*: which can not be a Case within this Act of Parliament.

If a Defendant is taken upon a *Capias pro fine* (or *pro redempione*,) it is an *Execution*; and no *Sheriff* can take Bail of him: It is a *Favour*, if the *Court* does it. By 5 E. 3. c. 12. no Pardon for an Outlawry shall be granted, till the Chancellor is certified that the Plaintiff is satisfied of his Damages

Damages. In a *criminal Case*, if the Party be convicted, and a *Capias ad Satisfaciendum* issues, and he is taken upon it, he is in Execution, to make Satisfaction; and the Sheriff can never foretell, before the Court have given the final Judgment, *what* that Satisfaction is to be, on which he should admit the Defendant to Bail, on the *Capias ultagatum*: He has nothing to direct himself by. No Clause of this Act can be put in Execution, on an Outlawry upon a *Conviction in a criminal Case*. Therefore I am of Opinion, that the present Case is *not* within it.

Mr. Justice ASTON—I am of the same Opinion. I think, this Act of Parliament relates only to *civil Actions*. This is evidently the true Spirit of it. It can't be imagined, that the Act can mean to allow of a Defendant's appearing by Attorney, in Cases where the Defendant is obliged to appear personally and can't appear by Attorney at all: Neither can it extend to taking Bail in Cases not bailable. But surely it can extend to Cases of criminal Misdemeanours, *after Conviction*; because, in such Cases, a Defendant is not intitled to be bailed at all. Outlawries after Conviction are very different from the Case of Outlawries for Non-Appearance upon mesne Process. After Conviction there is no Case where it has been holden that the Defendant has a *Right* to be admitted to Bail. In an Outlawry after Conviction for Misdemeanour, no Sheriff could take Bail: And consequently this Act could not have any such Case in View, or be meant to extend to it.

Mr. Justice WILLES—It is clear that the Defendant has no *Right* to demand being admitted to Bail. This is an Outlawry *after Conviction*. If it should be granted that he is intitled to be bailed upon the Outlawry, yet as he stands convicted of the Crime, he must be committed upon the *Conviction*. This Statute is indeed as obscure a One as any in the Statute-Book: It is difficult to ascertain its true Meaning. Therefore I don't choose to give any direct Opinion about its *Extent*; unless it should become absolutely necessary for me to do so. As the present Case arises upon an Outlawry *after Conviction*, it is clearly *not* a Case within this Act of Parliament. In Treason and Felony, Outlawries were Convictions of the Fact: And therefore they are particularly excepted out of this Act. But Outlawries in Cases of Misdemeanour are not Convictions of the Fact: Yet after actual Conviction of a Misdemeanour, the Defendant is not intitled to Bail; whether he be or be not outlawed. Even in a *civil Action*, a Person outlawed *after Judgment* could not have a Pardon, till Payment of the Debt. In the present Case, it would be merely nugatory, to discharge the Defendant upon giving Bail to prosecute his Writ of Error upon the Outlawry, when we must immediately commit him upon the Conviction. How can the Sheriff

riff know, at the Time of the Defendant's being taken upon the *Capias utlagatum*, whether the Court will at all admit of *special Bail*, or not? Or if they should, how shall the Sheriff know in what Sum it shall be? Or, if he should be fined, what will be the *Amount* of his Fine? Clearly, an *Outlawry after Conviction* of a Misdemeanour is not within this Act; whatever else may be within it.

THE COURT having thus declared their unanimous Opinion "that Mr. Wilkes, under his present Circumstances of standing convicted of a criminal Misdemeanour, had no Right to demand being admitted to Bail, under the Act of Parliament;

HIS COUNSEL moved that he might be bailed, upon the Foot of the general Discretion which the Court would exercise, of bailing or committing a Person convicted of a Misdemeanour, according to the particular Circumstances of his Case: Which they alledged to be sufficient, in this Gentleman's Case, to induce the Court to permit him to remain at large, under proper Bail. Public Justice was not intended, they said, nor at all likely to be evaded. He had always been amenable to Justice: He now surrendered voluntarily. Indeed, little Care had ever been taken to apprehend him. He always appeared publicly upon the Hustings, both in London and Middlesex; and he is Member of Parliament for the latter County.

LORD MANSFIELD—I have said, "that I knew no Case where a Person convicted of a Misdemeanour has been admitted to Bail without Consent of the Prosecutor." If any Gentleman knows any such Case, I should be glad to be informed of it: I know of none. We can not therefore do it, if the Attorney General does not consent. For, we must act alike in all Cases of like Nature: And what we do now, ought to be agreeable to former Precedents, and will become a Precedent in future Cases of a like Kind.

THE COURT declining to Bail him without the Consent of the Attorney General as prosecuting for the Crown, he was

COMMITTED to the MARSHAL.

His Counsel then moved for a Rule to bring him up to Morrow, to assign Errors. Which was GRANTED.

There were two Rules. The former was this, "The Defendant being brought here into Court, in Custody of the Sheriff of the County of Middlesex, by Virtue of a Writ

" Writ of *Capias utlagatum*, IT IS ORDERED upon the Motion of Mr. Attorney-General, that the said Defendant be now committed to the Custody of the Marshal of the Marshalsea of this Court, to be by him kept in safe Custody until he shall be from thence discharged by due Course of Law. And the said Defendant now here in Court producing a Writ of Error, and praying Oyer of the Record, IT IS ORDERED by this Court, that the said Writ of Error be allowed. On the Motion of Mr. Attorney-General."

The other Rule "that the Marshal or his Deputy bring the Defendant up to Morrow, to assign Errors," was a distinct Rule; and was taken upon the Motion of one of the Defendant's Counsel.

On Wednesday the 4th of May 1768, (a Week after making the last mentioned Rule) The Defendant having assigned Errors upon the Record of the Outlawry, and the Crown having joined in Error; * (All which was, by Consent on both Sides, privately transacted between the Agents, without actually bringing Mr. Wilkes into Court;) See the Joinder in Error, ante p. 1537. at the End of the Assignment of Errors.

Mr. Davenport moved to make the Joinder in Error a Concilium: And Saturday next was agreed upon as the Day on which it was to be argued.

Accordingly, on Saturday the 7th of May 1768, it was argued, by Serjeant Glynn on the Part of the Defendant, and Mr. Thurlow on the Part of the Crown. It was very well argued on both Sides: But it would draw this Report out into an insufferable Length, if the Particulars of it should be here inserted.

The great and capital Error that the Serjeant insisted upon, was the Insufficiency of the Return in not shewing that the Defendant had been five Times exacted from County-Court to County-Court, till he was outlawed, as the Law directs, and the Writ requires. He argued that this ought to appear certainly and precisely upon the Sheriff's Return: That Outlawries are odious; and that the Court will intend nothing in Support of so cruel a Proceeding, but, on the contrary, listen to the least Objection of Error in it. And here, the first Exaction does not appear to have been made in the County of Middlesex; nor any of the subsequent Ones, which are said to have been at the same Place with the first. The Words "near Holbourn in the County of Middlesex" do not import its being in the County. Besides, the Time and Place of the 2d, 3d, 4th and 5th Exactions ought to have been particularly specified and described: and not by Reference only to the first. Moreover, the Sheriff ought to have

have stated the *Proclamations* explicitly and particularly, and the particular Manner and Circumstances of them. He also made a Question “Whether an Outlawry lies upon an *Information*.” And he concluded with an Objection to the Information, as not being properly exhibited; being exhibited by his Majesty’s Solicitor-General, without taking any Notice of the Vacancy of the Office of Attorney-General: Whereas the Attorney-General is the known and proper Officer of the Crown for this Purpose; and the Solicitor-General has *no such Right*.

He cited a great Number of Cases and Precedents, in Support of his Objections.

Mr. *Thurlow* defended the Regularity of the whole Proceeding, by Reason, Argument, and Practice: And he also cited a great Number of Cases and Precedents, to support his Arguments and Allegations.

To which Mr. Serjeant *Glynn* having replied; and the Counsel for the Defendant having declared “that they did *not desire a second Argument*.”

THE COURT said that the very great Number and Variety of Authorities and Precedents that had been produced and very ably urged on both Sides, deserved and would require their mature Consideration; and directed Copies of the Records cited on both Sides to be laid before them; or at least One Copy of each Record, which they would deliver over from One to Another.

On Saturday the 14th of May 1768, (a Week after the before mentioned Argument) after Lord *MANSFIELD* and Mr. Justice *YATES* were gone,

Mr. *Davenport* moved for a Rule to bring the Defendant upon Monday, in order to be bailed: But he had no Affidavit of any particular Circumstances to induce the Court to grant such a Rule.

Mr. Justice *Aston* did not see, he said, how the Court could bail him, without any particular Circumstances being laid before them, when they had already and so lately determined, after a full Hearing of Counsel on both Sides. “that he was *in Execution* upon the Outlawry *after conviction* of Misdemeanours, and was *not admissible to Bail*.” He would not therefore, after Two of the Four Judges weere gone away, make such a Rule as was prayed: But Mr. *Davenport* might move it again, if he pleased, on Monday Morning at the sitting of the Court; and that would allow Time enough for the Defendant’s being brought

brought up the same Day, to be bailed, if the Court should think it a reasonable Motive.

Mr. Justice WILLES was of the same Sentiments with Mr. Justice ASTON ; and agreed to Mr. Davenport's having Leave to move it at the sitting of the Court on Monday.

Upon Monday the 16th of May 1768, the Court being then full,

Mr. Davenport accordingly renewed his Motion. He could only urge, that there were but two Grounds of Imprisonment: One, for Security; the other, for Punishment. The former failed in the present Case; because Mr. Wilkes had always voluntarily surrendered: The latter failed, because it was premature; For, the Case was not yet ripe for judgment upon the Conviction; and the Validity of the Outlawry was at present doubtful.

Mr. Davenport, upon being asked by LORD MANSFIELD, "Whether he had given Notice to the Attorney-General, " of this Motion," owned that he had not.

LORD MANSFIELD—However, it can't prevail; because the Defendant is in Custody after Conviction: Which is a Custody in Execution. It is not a Custody for Security only; but goes in Part of the Punishment, and will be taken into Consideration, upon the final Judgment: And so we told you before *. It was so in Lookup's Case, and in the Case of *Vide ante, a Welch Clergyman.

P. 2539.

A Defendant in Execution upon an Outlawry after Conviction of a Misdemeanour, in Crown Prosecutions, can't be admitted to Bail without the Consent of the Attorney-General.

If the Court had been of Opinion, upon the last Argument, to reverse the Outlawry, yet the Defendant must have continued in Custody upon the Conviction.

Errors upon Outlawries have seldom been solemnly argued. This Writ of Error has been solemnly and exceedingly well argued: And the Matter deserves to be seriously considered. What is determined upon solemn Argument establishes the Law, and makes a Precedent for future Cases; Which is not the Case of Questions agreed by Consent of Parties, or never litigated. This will be a Precedent.

The Court, in all Cases (without regarding who is the particular Defendant,) leans to the Reversal of Outlawries; because the Punishment of the Outlawry is often greater than the Punishment of the Offence itself. Here, the Defendant had the Merit of coming in voluntarily; not being brought

in by Process and in Custody. But the Court can't make Errors; nor reverse for Errors which do not exist, or which they can not see: They must be satisfied, that there are Errors: If the Court had been satisfied on any one Error assigned, they would have reversed the Outlawry for that Error. We did, several of us, when we came into Court, seem to think that the Want of Proclamations was a Flaw: But my Brother YATES doubted "Whether Proclamations were at all necessary in such a Proceeding as this." I wish that the Precedents and Acts of Parliament may be looked into, to see "whether Process of Outlawry will lie upon informations for Misdemeanours;" as well as to see "whether Proclamations are necessary or not, upon Process of Outlawry after Convictions for Misdemeanours." I desire that the Counsel will apply themselves to search into this Point, "Whether Process of Outlawry will at all lie upon Informations for Misdemeanours." And, as many Precedents have been already cited and produced, I desire also that the Precedents may be left with us, for our Perusal and Consideration.

Mr. Justice YATES—I should have thought that what was said by the Court upon the former Argument, would have been sufficient to have spared the present Motion. The Matter was then largely and very well argued; and the Court explained their Sentiments very fully at that Time: Their Opinion was, "that the Defendant being in Execution, he could not be bailed, without Consent of the Attorney-General on the Part of the Crown." To Bail him upon the mere Assignment of Errors, would be Prejudging upon the Errors: It would presuppose "that they were fatal." He is at present in Execution; and can't be taken out of Execution, without Consent of the Attorney-General on behalf of the Crown.

But since this Matter is again brought upon the Tapis, it gives me an Opportunity of suggesting my own Doubts. If Proclamations are necessary, I should think this Return to be clearly bad: But if Proclamations are not necessary, it is then immaterial when, or where, or how they were made. As to what has been said about the Expression "at my County-Court" not being determinate, because he might be Sheriff

* Vide ante 2530 and 2535. of two Counties *—there are two Authorities which either were not mentioned at the Bar, or (at least) were not fully stated. One of them is 1 Ventriss 108. where an Outlawry was reversed for that the Proclamations were returned to be "ad Comitatum meum tent. apud such a Place in Comp. praedict;" and not said "pro Comitatu :" For anciently one Sheriff had two or three Counties, and might hold the Court in One County for Another. The other of those Cases is in 2 Roll's Reports 52. Robert A'der's Case; who was outlawed for Murder: And it was moved for Error, that the Sheriff returned "ad Comitatum meum tentum apud D. in le County
" de

" de Norib^{er}nber^{land} ;" and did not say " Comitat. meum
" Northumbriæ tentum, &c." And this was holden to be
Error, by the Court; according to the Case in 6 H. 4. where
it is returned " ad Com. meum Somersett tentum." And there-
fore it was holden erroneous: For, One may be Sheriff of
Surry and *Suffex*, and also of *Huntingtonshire* and *Cambridge-
shire*. But this is not possible in the Case of the Sheriff of
Middlesex. The Sheriffs of *London* have been immemorially
the Sheriff of *Middlesex*: Therefore he could not have two
Counties. But I should always incline to favour Errors assign-
ed in Outlawry; because it is more just and right, that Judg-
ment should be given upon the Conviction for the *Offence*.
Therefore, my Doubt being against the Errors assigned,
I should be unwilling that more regard should be paid to it,
than it shall appear strictly to deserve: And I would not have
proposed it, if I had not thought it incumbent upon me to
communicate it, since it has occurred to me, and seems to
me to have more Weight than perhaps it might appear to
Others to have.

But my Lord's Doubt is a very material one—" Whether
" the Offence charged in the Information is such a Crime as
" will warrant an Outlawry."

The 18 Ed. 3. Stat. 1. c. 1. * has negative Words in it, * Vid, also
in the printed Edition of the Statutes; though it is said not Stat. 2.c. 5.
to be so in the Parliament-Roll. At Common Law, Outlawry
lies only for Treason and Felony, as I apprehend. Therefore
the Court will be glad of hearing the Arguments at the Bar,
to assist their Inquiry in this Doubt.

Mr. Justice ASTON.—The Opinion of the World
ought not to weigh at all with the Court in forming their Opin-
ion upon the Validity of the Errors assigned upon this Out-
lawry. If one flat, decisive Objection had clearly appeared,
the Court would have immediatly given their Opinion, upon
the first Argument. I was not satisfied, myself, that the
minor Objections had sufficient Force in them: And as to the
greater Ones, the Counsel for the Defendant seemed to me to
be too sanguine and too much attached to their own Opin-
ions, when they declined the Offer of a further Argument,
when the Court wished to be further informed by hearing it
argued again. But this Doubt which my Lord has mention-
ed, " Whether Process of Outlawry will lie for the Crimes
" charged in these Informations," is a very material One,
and ought to be well considered. It may be necessary to look
into *Bracton* and other Books; and the Statutes of 18 E. 3.
St. 1. c. 1. and St. 2. c. 5. and 1 E. 1. c. 20. and a Case in
the Year-book of 35 H. 6. fo. 6a. pl. 9. " that Process of
" Outlawry did not lie; because the Action was not for a

"Tort supposed to be done *vi et armis*." It may be a doubt
 "Whether Process of Outlawry lies on Informations of this
 "kind, for Offences which though expressed to be done *vi*
 "*et armis*, are not really done with *actual Force*." The 18
Ed. 3. Stat. 2. c. 5. says "that no Exigent shall go, where a
 "Man is indicted of Trespass, if it be not against the Peace,
 "or of Things contained in 18 *E. 3. Stat. 1.*" And though
 the Words "*nemy des autres*" are not to be found in the Par-
 liament-Roll, yet they are in several Manuscript Copies.
 These Things deserve to be maturely considered.

It is proper also to inquire into the Practice and Precedents ;
 and to see whether they have been uniform and concomitant.
 Trespasses in Parks may be effectually done, without actual
 Force.

The Court will not keep back their Opinion, without having
 sufficient Ground for Doubting, and a Necessity of taking
 Time to satisfy their Doubts : On the other hand, they will
 not give their Opinions over-hastily and prematurely, merely
 to gratify the Humours or Passions of Mankind.

Mr. Justice WILLES concurred that the Defendant
 was not bailable ; being in Execution upon the Outlawry after
 Conviction. He thought, with Mr. Justice AIRON, that the
 Defendant's Counsel were in the wrong when they declined a
 second Argument, which might have given the Court further
 Light. He expressed his Inclination towards the Reversal of
 Outlawries, on Account of the Severity of the Judgment
 upon them, which sometimes exceeded what would be the
 Punishment upon the Conviction itself.

For the Reasons above particularized,

Mr. Davenport took Nothing by this Motion.

On Wednesday 8th of June 1768, (being the Sixth Day of
 Trinity Term 8 G. 3.) Mr. Attorney-General and other Coun-
 sel for the Crown were further heard. But the Counsel for
 the Defendant rested their Case upon the former Argument.

LORD MANSFIELD expressed himself to the following
 Effect.

GREAT Pains have been taken, and great Searches have
 been made, since the last Argument ; not only (as I see now)
 by Mr. Attorney-General and Those he has employed, but
 by Some of Us. I say "Some of Us" ; because I cannot,
 with Truth, assume the Merit to Myself : The Load of
 other Business which lay upon me, made it impossible. But
 from

from the able Assistance of Those who have taken the Trouble to make Searches and to collect Materials, I think I am now thoroughly Master of a Subject which I am not at all ashamed to say I knew very little of before: And I never give a judicial Opinion upon any Point, until I think I am Master of every material Argument and Authority relative to it. It is not only a Justice due to the Crown and the Party, in every Criminal Cause where Doubts arise, to weigh well the Grounds and Reasons of the Judgment; but it is of great Consequence, to explain them with Accuracy and Precision, in open Court; especially if the Questions be of a general Tendency, and upon Topics never before fully considered and settled; that the criminal Law of the Land may be certain and known.

OUTLAWRY is a very important Part of that Law. Yet it is no Wonder, that the Forms and Method of Proceeding are so little attended to, and so little understood: For, this is perhaps the first Occasion where any Question of Law, upon a Writ of Error to reverse an Outlawry in a *Criminal Case*, ever underwent a serious Litigation.

Outlawry in *civil Actions* is considered as in the Nature of Civil Process, to compel an Appearance to the Suit; or, if after Judgment, to procure Satisfaction. The Forfeiture, though nominally to the King, yet in Truth goes to the Plaintiff, towards Payment of his Demand. If the Outlaw appears, pays all the Costs, puts in sufficient Bail, and does every Thing he can to put the Plaintiff in as good a Condition as he would have been in originally; Or if, after Judgment, the Outlaw pays the Debt and Costs; the Court reverses the Outlawry upon Motion, *without* any Writ of Error. The Form of the Reversal always is, "For the Errors *assigned* " and other Errors appearing upon the Record": Although there is, in Truth, *no* Error at all.

Flight, in *Criminal Cases*, is itself a Crime. If an innocent Man flies for Treason or Felony, he forfeits all his Goods and Chattels. Outlawry, in a *capital Case*, is as a *Conviction* for the Crime: And many Men who never were tried have been executed upon the Outlawry.

In *Misdemeanours*, Outlawry is generally a more severe Punishment than would be inflicted for the Crime of which the Outlaw stands accused or convicted. It is a Forfeiture of his Goods and Chattels and all the Profits of his Real Estate; and perpetual Imprisonment, with many Incapacities. If it is erroneous, it cannot be reversed without a Writ of Error.

* 1 Vernon Till the 3d of Queen *Ann*, a Writ of Error in any *Criminal Case* was held to be merely *ex gratia*. Lord Keeper lays it down * "that a Writ of Error in a *Criminal Matter* was *ex gratia Regis, in all Cases*"; and said † "He had a Collection of several Cases out of the Old Books of the Law, in the Rioter's Case. " that were given him by Lord Chief Justice *Hale*, which shew that Writs of Error in criminal Cases are not grantable " *ex debito iustitiae*, but *ex gratia Regis*: And in such a Case, " a Man ought to make Application to the King; And he " will then refer it to his Counsel; And if they certify that " there is Error, the King will not deny a Writ of Error." It never was granted, except when the King, from Justice, where there really was Error, or from Favour, though there was no Error, was willing the Outlawry should be reversed. After a Writ of Error granted, the Attorney-General never made any Opposition: Because, either he had certified " there was Error," and then he could not argue against his own Certificate; Or the Crown meant to shew Favour, and then he had Orders "not to oppose." The King, who alone was concerned as the Prosecutor, and who had the absolute Power of Pardon, being willing that the Outlawry should be reversed, This Court reversed upon very slight and trivial Objections, which could not have prevailed, if any Opposition had been made, or if the Precedent had been of Consequence. The Form of Reversal, "for the Errors assigned and other Errors appearing upon Record," delivered the Court from the Necessity of specifying any; And they might think themselves well warranted to reverse, upon the tacite or express Consent of the King, where he alone was concerned to oppose; though there really was no Error at all: And, as the King had the Power to refuse a Writ of Error, the Precedent was of no Consequence.

^{† v. the Ailfbury Case.} But in the 3d of Queen *Ann*, † Ten of the Judges were of Opinion "that in all Cases under Treason and Felony, a Writ of Error was not merely of Grace; but ought to be granted." Price and Smith were of a contrary Opinion, "that a Writ of Error was of Grace only, in ALL criminal Cases." The Ten did not mean "that it was a Writ of Course"; but that, "where there was probable Error, it ought not to be denied."

It cannot issue now, without a *Fiat* from the Attorney-General; who always examines whether it be sought merely for Delay, or upon a probable Error.

¶ 9 Geo. 1. In the Case of the *King* against *Earbury*, ¶ the Opinion of the Vid. ante, Court was taken, before the Attorney-General granted his Fiat p. 2530. for a Writ of Error. In the present Case, the Attorney-General refused his Fiat, while the Defendant was out of Custody.

This

This Opinion in the 3d of Queen *Ann* has made a great Alteration as to Outlawries in Criminal Cases under Treason and Felony. In a *Misdemeanour*, if there be probable Cause, it ought not to be denied: This Court would order the Attorney-General to grant his Fiat. But be the Error ever so manifest in *Treason or Felony*, the King's Pleasure to deny the Writ is conclusive. Lord *Muskerry*, the Son and Heir of the Earl of *Clancarty*, Petitioned for a Writ of Error, to reverse his Father's Outlawry, because his Father was a Prisoner in the Tower of *London* during the whole Time of the Proceedings against him. The Fact was verified beyond Doubt, by Entries from the Books of the Tower, and by the Affidavit of the Duchess of *Marlborough*. The late Lord Chief Justice *Willes*, then Attorney-General, reported the Writ to be merely of Grace: And, upon political Reasons, it was absolutely refused; And the Outlawry stands.

A Writ of Error being as a Matter of Right, where there is Error in the Outlawry; Since the 3d of Queen *Ann*, in all Crimes under Treason and Felony, "WHAT is an Error" became an important Question: which was of no Consequence, before. Since that Time, this Court has not given Way to trivial Objections, though admitted by the Attorney-General. In 1708, Lord *Griffin* was brought into this Court upon an Outlawry for High Treason: And upon the Prayer of the Solicitor-General, (there being then no Attorney-General,) a Rule was made for his Execution. He was reprieved, from Time to Time, till his Death. His Grandson and Heir, from the Grace and Favour of King *George* the first, obtained a Writ of Error. Sir *Philip Yorke*, then Attorney-General, came into Court, and said he had a Sign Manual "to confess the Errors and consent to the Reversal." The Court told him "His Confessing an Error in Law would not do: THEY must judge it to be an Error; And their Judgment would be a Precedent. But the Plaintiff in Error might assign an Error in Fact; which, by proper Authority, he might confess." Accordingly, the Plaintiff assigned an Error in Fact, viz. "that the Place of his Grandfather's Residence was in the County of *Northampton*; whereas he had been outlawed in *London*." The Attorney-General confessed the Fact: Whereupon, the Outlawry was reversed*. SINCE the *Hil. 13.^o 3d of Queen *Ann*, no Question of Law has been litigated, G. L. upon a Writ of Error to reverse an Outlawry; no Criminal Outlawry has been reversed upon a trivial Objection: No Case, since that Time, has been found, of either Kind.

OUTLAWRY is an essential Part of the Criminal Law. The Rules and Method of Proceeding are wisely calculated, to prevent Ignorance and Surprise. The Consequences are made severe, because the Offence is heinous; and it imports the State,

State, that no Man should fly from the Laws and Justice of his Country. This Court is bound to pronounce the Law as they think it is; Always leaning to the favourable Side, where they doubt: For, so says the Law. It is as much a Breach of Duty, to reverse a good, as it would be to affirm a bad Outlawry. The Mischief goes farther than an unrighteous Sentence in the particular Case. For, to reverse without an Error, is to abolish that Part of the Law. And therefore Serjeant *Glynn* admitted that Criminal Outlawries were not to be reversed of Course: An Error must be found.

In a Matter where the Consequence may be so penal to the Defendant in this particular Case; where the Grounds of the Judgment must be so important to a very essential Part of the Criminal Law, never before brought adversely in Question, and therefore lying under great Obscurity and Confusion; I feel Myself extremely obliged (and I think the Public obliged, to Those who, in the short Time taken for Consideration, have searched the Subject to the Bottom. From the Materials with which I have been furnished, I think Myself sufficiently instructed, to form an Opinion: And I will declare the Grounds and Reasons of that Opinion which I have formed, to this great and numerous Audience, with as much Accuracy and Precision as I can, to prevent Misapprehension.

There are two Sorts of Error which have been assigned and argued.

1st. The first Sort are Errors which gave Rise to *Questions of Law*, and to *Real Arguments*.

2d. The second are Criticisms upon *Words* and *Syllables* in the Return.

Of the first Sort, Two are assigned.—

1st. That there is *no sufficient Information* filed or exhibited against the Defendant, whereon to ground the Process of *Outlawry*.

2d. That *no public Proclamation* whatsoever is mentioned to have been made at any open Court, or at any General Quarter-Sessions of the Peace whatsoever; or at the Doors of any Parish Church where the said Defendant was an Inhabitant; according to the Exigency of the said Writ of *Capias cum Proclamacione*.

UNDER the first Error assigned, three Objections have been made—

1st. That the Information is by the *Solicitor-General*, and not the *Attorney-General*.

2d. That an Outlawry does not lie upon an *Information*.

3d. That though it may lie upon an Information, Yet it does not lie for *such an Offence* as is prosecuted in either of these Cases.

First—The Information is by the *Solicitor-General*.

If this Objection is founded, it will equally hold upon a Motion in Arrest of Judgment. But, I believe, None of Us, from the Beginning, ever entertained the least Doubt concerning it. An Information for a Misdemeanor is the King's Suit. The Title of the Cause is “The King against the Defendant;” The Oath, at the Trial, to the Jurors and the Witnesses, is “between the King and the Defendant.” As a Subject sues by Attorney, so does the King; with a little Variation of Form, from Decency: Instead of saying “The King sues by—”, it is said “—sues for the King;” And yet, “Coram Domino Rege venit § Dominus Rex per Attor- § 2 Lev. 82, natum suum, et inde producit Seṭam,” was held to be 3Keble 127. good (*Hale* Chief Justice said, it was but an unmannerly Way Raftal's Entr. 655b. of declaring for the King.) The Attorney is answerable, if he acts without Authority; And upon Complaint by the Party whose Name he has falsely used, the Court would punish him, and set aside the Proceedings: But while the Principal avows him, neither the Adverse Party nor the Court can dispute his Authority. The Coroner of this Court prosecutes Informations for the King, as his Attorney. The Form of the Proclamation at Criminal Trials is a strong Proof that anciently the King's Serjeant might prosecute for the King. When there did not exist such an Officer as Solicitor-General, the King's Serjeant or his Attorney, or other that would sue for the King, should be received to aver against the Testimony of the Parties Imprisonment, where the Outlawry †Vid. 5 Ed. was pronounced at the King's Suit.† There are many Entries in Raftal,§ which shew that at the Common Law Others †Title than the Attorney-General have sued for the King; Or, in Debt, 192b other Words, the King has sued by Others as his Attornies. pl. 4. Title Serjeant *Glynn* cited a Manuscript Treatise concerning the Escheat, Star Chamber; of which, Mr. *Filmer* has a Copy: The Title Quare Original is in the Museum ||. The Author's Name is pre- Impedit. served in a Note written in this Present-Book, at the Beginning 527b pl. 1. || Harleian Catalogue. “This Treatise was compiled by *William Hudson* of Gray's-Inn Esq. No. 1226, “ quire, Vol. I.

" quire, One very much practised and of great Experience
 " in the Star-Chamber, and my very Affectionate Friend.
 " His Son and Heir, Mr. Christpher Hudson (whose Hand-
 " writing this Book is,) after his Father's Death, gave it to
 " me. 19 December 1635. J. Finch."

*Fol. 84. The whole Passage should be taken together; and is in these * Words—" It re-
 and 85. maineth that I shall, in the next Place, treat of the King's

" Ordinary Suits: Which are of two Sorts;—either by his
 " Attorney, informing of himself, or by other Mens Relati-
 " ons, and by the King's Almoner; the One being in Crimi-
 " nal Causes, the other in Civil. For the King's Attorney,
 " I have known it much questioned Whether any other of
 " the King's Counsel may not inform for the King, as well
 " as the Attorney-General. And it is true, that in *Easter*
 " Term 8 *Henry 8.* it is ordered that the King's Solicitor
 " shall not prosecute any further the Merchants of the Stili-
 " ard, till it were otherwise ordered by the Council: And the
 " same Term, the Solicitor was commanded to sue out Pro-
 " cess against some which acquitted One Blase of a Rape. So
 " that it seemeth, that Others of the King's Counsel did
 " prosecute Causes for the King, as well as the King's At-
 " torney. But in 1 & 2 *James* the 1st it was resolved by the
 " Court, that it belongeth to the Place of the Attorney. And
 " Serjeant *Heale*, the King's Serjeant, putting in a Bill
 " against Sir *John Hudson*, was denied that Privilege. For,
 " if a Bill be put in by the King's Counsel as for the King,
 " there are no Costs to be paid to the Defendant, nor Fees
 " for the Prosecution: But in this Case, Serjeant *Heale's* Bill
 " was dismissed with 30l. Costs; it continuing in Prosecu-
 " tion not above two Terms." It is astonishing how any other
 Law-Officer of the King could claim, *as an Official Right*, to
 be the King's Attorney in all Suits which they should think fit
 to bring in the King's Name. The very Constitution of an
 Attorney-General is decisive against it. He might stop every
 Suit brought by Another. And therefore the Council did
 very right, as between the King's Law Officers, to overrule
 Serjeant *Heale*: But they did not mean, that the King Him-
 self, for special Reasons, might not appoint Another to act as
 his Attorney. In that Reign, afterwards, *Yelverton* was sus-
 pended, and the Solicitor appointed to act. Suppose the At-
 torney-General personally the Defendant: There must be
 Another to sue for the King. Suppose the Attorney-General
 out of the Realm; or under a Disability from Sicknes: Sup-
 pose the Office of Attorney-General vacant, When it is,
 The Business, (which cannot stand still,) must devolve upon
 Another of the King's Counsel: And there is Nothing so
 certain, as that the whole Business and Authority of the At-
 torney devolves upon the Solicitor General. I am satisfied,
 that if the Matter was traced, the two Precedents in *Easter*
 Term 8 *Henry 8.* mentioned by Mr. *Hudson*, were during the
 Vacancy of the Attorney's Office. It is impossible the Council
 could

could, in the same Term, order the Solicitor-General to stop One public Prosecution and commence another, if there had been an Attorney-General. As far back as the Memory of the Vacancies of the Attorney's Office had led to a Search, Precedents have been found of Informations filed by the Solicitor-General, in Chancery, and on the Law Side of the Exchequer. In this Court, the Information against the Earl of *Devonshire** was prosecuted by the Solicitor-General; And though the Enormity of the Fine set, and the Revolution of Government which immediately followed, made this Case the Subject of much Animadversion and just Censure; "The Solicitor-General having prosecuted," was never objected. There are Principles of Replying, Demurring, Taking Issue, Praying Judgment or Award of Execution, by the Solicitor-General, during the Vacancy of the Other Office. We all know, from our own Experience, that upon every Vacancy which We remember of the Attorney's Place, his Office has been executed by the Solicitor-General. But it is said, "The Information ought to have suggested that the Office of Attorney was vacant." Many of the Precedents do not suggest it: And there can be no Objection. The Attorney-General is a great Officer of the Law and of this Court. The Court take Notice when the Office is vacant; and by Whom it is filled, when full. They give Credit to the Solicitor-General, when he sues as Attorney for the King, "that he *has Authority.*" He does it at his Peril. In this Case, before the Defendant pleaded, the Solicitor-General was made Attorney, and in that Capacity brought into Court the Information he had filed as Solicitor. If any Objection could lie to his Authority as Solicitor, the only Question would be, "From what Time the Information should be considered as commenced: From the filing by the Solicitor; or the bringing into Court by the Attorney." And that could be of no Consequence, but in respect of the Time when the Defendant ought to plead. But he has pleaded to the Information brought in by the Attorney-General; And been tried. In every Light and in every View, this Objection is groundless: Nothing has been offered to support it, but Serjeant *Heale's* Case. Upon so plain a Point, I certainly should not have said so much, but that the Objection goes in Arrest of Judgment, and therefore may be argued again. The Counsel are apprized of my Reasons: And if they should think their Objection tenable, I am open to Conviction.

Second Objection under the first Error Assigned—"That an Outlawry does not lie upon an *Information.*"

The Counsel for the Defendant supported this Objection, two Ways. First, They said, The Books were silent on this Head: And the Statute of *Additions* mentions only that "in Original Writs of Personal Actions, Appeals, and *Indictments*, in which the Exigent shall be awarded, &c. &c. + *Vid. 1 H. But 5. c. 5. §. 1.*

But an *Information* is not therein mentioned. Secondly, They said, that from the *Nature of the Process* in an *Information*, the *Exigent was not awardable*. For, the Proceedings by *Information* in this Court is similar to the Star-Chamber Precedents: And in such Proceedings, they did not award a *Capias*, but a *Subpæna*. That here, the antecedent Process is by Summons of *Attachment*, not by *Capias*; And consequently, if there is no *Capias* to introduce the Process of *Exigent*, it can not lie in this Case. Serjeant *Glynn* admitted, as a Point beyond all Doubt, "that Informations of this kind " were competent, in this Court, at the *Common-Law*." No Lawyer ever doubted of it: No Lawyer would seriously argue against it. So that Sir *Bartholomew Shower* had no Opportunity to deliver the Argument he has printed.* Informations here neither derive their Being, nor the Form of Proceeding upon them, from the Star-Chamber; but from the Common-Law of the Land, and the Usage and Practice of this Court where they are exhibited. Although Informations are not mentioned in the Statute of Additions, yet the same Requisites of Certainty and Precision must be in an *Information*,

* 1 Shower 106. Rex v. Beschet et al'. Prynne's Cafe, 5. Mod. 459. ^{† 2 Haw-kins P. C. 260, 261.} as in an Indictment.† *Presentment* is not mentioned in this Statute. And yet, on a Presentment before the Coroner, " that *French* was *Felo de se*," (which was certified into the King's Bench,) " and that certain of *French's* Goods were in " the Possession of *J. S.*" Process issued against *J. S.* until he was outlawed. And upon Error brought " for that there was " not any Addition given to the said *J. S.* in the Presentment " upon which he was outlawed," it was at first doubted " Whether upon that Presentment Process of Outlawry did " lie: And *Ive*, Clerk of the Crown Office, said to the Court " that such Process in such Case did lie; and that he " could shew Five Hundred Precedents of it." And, secondly, it was moved " if this Outlawry ought to be reversed for " Default of Addition." But it was agreed by the whole Court, that, as to this Purpose, the Presentment should be

‡ *French's* accounted in Law as an Indictment.‡ To an *Information* in Cafe, Mich. Nature of a *Quo Warranto*, to shew by what Authority the 26 Eliz. 2. Defendant claimed to be a Burges of *Grampound*, the Defendant pleaded in Abatement, for want of proper Addition; the *Information* styling him " *Labourer*," whereas he was Clothier: And this Plea was moved to be set aside, on the Ground " that an Addition was not necessary." The Court refused to set it aside on that Ground: But they found another, the Want of a proper Affidavit to verify the Plea.§

§ The King against Par. There seems as good Ground to say, upon the Foot of Precedents and Construction of the Statute of Additions, " that G. 2. 1741. " Process of Outlawry lies, and Addition is requisite in an " *Information*, as in the Presentment in *French's* Case. As to the other Argument from the *Nature of the Process*—There was no Authority or Precedent cited or produced, to prove the Assertion. On the contrary, there are many Precedents

cedents where the Process was by *Capias*; and the Exigent followed: Some, as in the present Case; though most are before Conviction. But "that a *Capias* does lie in Process upon these Informations," I take to be as old as their Existence. If not, how could there have been such a Number of Outlawries upon Informations; and some, of ancient Date? All these Records are so many Authorities to support this Process; which are not, after so great a Length of unquestioned Usage, to be now impeached*. And it is observable^{5 Mod.} on the 18 *Edw. 3. s. 1.* that it not only clearly relates to a Proceeding before Judgment; but it gives the Exigent, if the Party is not brought in on an *Attachment* or *Distress*. However, there is no need to resort to that kind of Reasoning; when *Usage* supports the *Capias*, in the present Case, as the Common Process upon these Occasions.

Third Objection under the first Error assigned—"That Outlawry does not lie, from the *Nature of the Offence*."

This Objection was slightly touched by Mr. Serjeant *Glynn*; but struck us, at first, as a Point fit to be considered: And I mentioned to the Bar, "that it might be proper to look into it." The Doubt was, "whether the Offence charged in either of these Informations was such as rendered the Person accused of such Crime liable to the Process of Outlawry, either at *Common-Law* or by any *Statute*." In *Coke Littleton 128.* it is said "that in the Reign of King *Alfred*, and till a good while after the Conquest, no Man could be outlawed but for Felony; the Punishment whereof was Death: But after, in *Braeton's* Time and somewhat before, Process of Outlawry was ordained to lie in all Actions that were *Quare vi et armis*, which *Braeton* calls *Delicta*, for there the King shall have a Fine." The 18 *Edw. 3. s. 1.* declares the Cases and Offences for which the Exigent shall be awarded, if the Party can not be found or brought in by Attachment or Distress; and not against any other: Also, the 18 *Edw. 3. s. 2. c. 5.* says—"No Exigent shall from henceforth go out, where a Man is indicted of Trespass; unless it be against the Peace, or of Things which be contained in the Declaration made in that Case at the last Parliament." But upon full Consideration, I am very well satisfied that the Counsel for the Defendant judged right in laying no Stress upon this Objection. The Offences laid in these Informations, and the Proceedings upon them, are at the *Common-Law*. The *Statutes* giving Process of Outlawry in certain Cases, and restricting its issuing in others but under certain Circumstances, do not affect the present Question. The Process is warranted, in the present Case, by the *Common-Law*, or not at all. *Actual Force* or *Violence* does not appear to be the Criterion upon which the Process of Outlawry was founded. The *Greatness of the Crime,*

Crimes, and the Severity of the Punishment seem to be the material Circumstances originally attended to, in founding this Process; according to the Passage I have just cited from *Coke*, as to the earliest Times: For, Felony does not imply or convey the Idea of actual Outrage: Grand Larceny being in its Definition, as well as Practice, different. And *Hawkins* confirms this Notion, by saying "that this Process probably lay for all Crimes of a * higher Nature than Trespass *vi et armis*." The Extension of this Process is supposed by Lord *Coke*, in the Passage I quoted (and what he says, is repeated, without Examination, by a Variety of Authors) to have been somewhat before *Braeton's* Time. The establishing that Period, for a supposed Ordinance concerning Outlawries, strongly authenticates the Testimony of that Cotemporary Writer, touching the Cases in which, and under what Circumstances this Process lay. Lord *Coke* saw, that it was impossible to say "that Outlawry did not lie for any Crime under Felony :" Universal Practice shewed the Contrary. So he supposes a positive Statute made about *Braeton's* Time. There does not appear any particular Ordinance for extending this Process: And there is no Authority for the Supposition.

† Lib. 3.
p. 127. b

But *Braeton* (who wrote in the Reign of Henry the 3d.) says † "that it lay *in omni transgressione, quæ sit contra pacem*;" and afterwards, "pro omni transgressione, licet minima, ubi quis ad pacem Domini Regis vocatus, venire recusaverit, et hoc propter Contumaciam." That this necessary ingredient "Contra pacem" did not mean positive Force in the Committing of the Offence, appears from the Reason given why it lay for Felony, 2 Ro. Abr. 805. "Outlawry lay for Felony; because it was contra pacem." For, that could not mean (as I have already said) more than its being an Offence in its Nature against the Laws of Society, and a Disturbance of that good Order and Government which keeps a State in Unity and Peace. The Crime of *Larceny*, in its very Nature, is secret and fraudulent, unless it be done with open Violence; and then it is distinguished by the aggravated Name of Robbery. Besides, In the Case of Writs *quare vi et armis*, (in which Cases this Process is given) it is acknowledged to be on account of the *supposed*, not the actual Force. And so is the same Place in 2 Ro. Abr. 805. and the 35 H. 6. 6. a and b and many other Books. In Fact, therefore, it appears from *Braeton*, "that every Offence committed against the Peace subjected the Delinquent to the Process of Outlawry." And the Cases shew, that the Peace of the King is broke by Disorders without Force. And indeed some of the greatest Crimes are without Force. If Force was the Criterion on which this Process of Exigent was founded at Com-

mon-Law, why was that Process given by the † first Statute 3. st. 1. of Edward the 3d. in the Case of *Riots*, &c? Or what Occasion had there been for the § subsequent Statute of Edw. 3. st. 2. c. 5. the 3d. to say—"From henceforth, it shall not issue in Tres-

*'pass,

"*pax, unless it is against the Peace,*" if the Practice had not been, upon Indictments, though not so alledged, for Process of Exigent to issue? And that seems to be the true Reason of the last restrictive Statute. I don't find it ever was denied, but that upon a Presentment or Indictment for the King, Process of Outlawry lay: And so it is expressly said to be agreed, in Brooke Title "Exigent;" which cites 8 H. 6. + But a Number of Outlawries have been found, in Crimes laid to be Abr Title *contra pacem, without vi et armis*, and which could not be Exigent and committed with Force; and this Error never assigned: Which, Capias, pl. alone, is decisive. I think, Mr. Attorney-General produced 29. and Title Process. One as far back as the 5th of Edward the 4th. pi. 16.

The SECOND Error assigned is as to the PROCLAMATIONS.

The Return says—"I have caused public Proclamation to be made, in Manner and Form as I am within commanded." This is certainly *too loose*: The Proclamations are not sufficiently set out, for the Court to judge whether they were properly made or not. I thought this Error *fatal*. But Mr. Thurlow satisfied me "that it was *unnecessary* to make ANY "Proclamation at all." The Statutes which require Proclamations do not extend to this Case: And they are not required by the Common-Law. Indeed, this Error was in a Manner dropped and given up by Serjeant *Glynn*, upon his Reply: He did not contend "that they were necessary." The present Record, drawn in the Crown Office and settled by the King's Counsel, shews under what Obscurity and Perplexity this Matter lies: The Result of Ignorance in the Practisers; and productive of a shameful Confusion in the Precedents of the Office. They have not distinguished between Civil and Criminal Outlawries: They have not distinguished between the Manner of proceeding to Outlaw in Criminal Cases, before and after Conviction. All is jumbled together: Whatever is required in *any* Case, they have applied to *All*. Circumstances are unnecessarily required, and defectively returned; because former Mistakes are copied as Precedents, without Examination. But, as the Proclamations, in *this* Case, were nugatory and superfluous, the Imperfection of the Return is of no Consequence: It is no Error.

Of the SECOND Sort of Errors, *Critical and Verbal*, Two are assigned: Which were argued.

1st. For that it is not shewn, nor does it appear by the Return of the Sheriff of Middlesex, "that the Defendant was a first, second, third, fourth, and fifth Time exacted at the County Court of the County of Middlesex; as, by the Law of the Land, he ought to have been, before he was outlawed.

UNDER this Error thus assigned, Two Objections were made: As to the *first Exaction*; and as to the *subsequent*.

First. As to the *first*—The Return is by Two Men, Sheriff of *Middlesex*: “At my County-Court, held &c.” So that Two Men, making One Officer, that is, *Sheriff* of the County of *Middlesex*, say “At my Court held in the County of *Middlesex*.” To raise a Doubt, it is necessary to go out of the Record, into History and Law. We know from thence, that the same Man might be Sheriff of two Counties. Till the 13th of *Elizabeth*, One Person was Sheriff of *Somerset* and *Dorsetshire*; and so of *Sussex* and *Surry*; of *Oxford* and *Berks*; of *Nottingham* and *Nottinghamshire*: And to this Day, the same Person is Sheriff of *Cambridge* and *Huntingdonshire*. Such a Sheriff might by Law hold in either, the County-Court of the Other, 6 H. 7. 15^b In the Case of the Sheriff of *Somerset*, who was then also Sheriff of *Dorsetshire*. “my Court in the County of *Somerset*” was adjudged uncertain. 11 H. 7. 10. in a like Case, *Rede Fairfax* and *Hussey* inclined to think it certain enough; and adjourned the Consideration. But here it is impossible to raise a Doubt. Unless the Sheriff of *Middlesex* may hold the Court of another County in *Middlesex*, “At my County Court” can only be the County-Court of *Middlesex*. Two Men, Sheriff of *Middlesex*, never were nor could be *Sheriff* of any other County. The Error is not assigned, for want of any technical Form of Words; but “that it is not shewn, nor does it appear by the Return:” Whereas I am of Opinion it is shewn, and does appear by the Return, that the County Court was of *Middlesex*, and could not possibly be the Court of any other County.

Secondly—As to the *subsequent Exactions*—The Objection is “that it is not shewn, nor does it appear, where the Court was held, at which he was exacted.” The Return, having specified the Place where the Court was held at which he was first exacted, states severally the subsequent Election “at my Court held at the same Place.” So that the whole Doubt is “Whether the same Place includes the Description of the Place referred to:” Which can not be a Doubt, in any Language of the World. For, in Truth, the Doubt can be no Other than “Whether the same Place means the same Place, that is, the Place before described.”

SECOND Critical Error. The only other Error assigned and argued, is —

“It is nowhere expressly shewn, that the Place called “*Brook-street*, where the several County-Courts are supposed to have been held, is in the County of *Middlesex*.” The Return

Return says—“ At the House known by the Sign of the Three “ Tuns in Brook street near Holborn in the County of Middle- “ sex” The Counsel for the Defendant contend, that the true Construction ought to be, to apply “ in the County of “ Middlesex,” to Holborn, and *not to Brook-street*; and so make a Stop, at Brook-street. It is impossible for me to doubt whether “ *near Holborn*” is n’t Part of the Description of Brook-street. It could be added for no other Reason: it could answer no End, to say “ *near Holborn*” but a Part of the Name or Description of *this Brook street*, in Contradistinction to some other *Brook-street*. It is immaterial, what County Holborn is in: But the Sheriff was bound to shew that *Brook- street was in Middlesex*. There is no Law in this: It is a Question of *Construction*, All Men can judge of it; and would treat with Contempt the Judgment of this Sovereign Court, if it could be founded upon so pitiful a Prevarication. It is not permitted to me to say “ I doubt of the Construc- “ tion,” *unless I do doubt*; how much soever I may *wish* that this Outlawry should *not stand*. I am of Opinion, that according to the Letter, Sense, and Grammatical Construction of the Sentence, the Court was held in “ *Brook street, near Holborn*;” and that “ *Brook street, near Holborn*,” lies in the County of *Midd'sex*: And I am persuaded, there is no Man who can think otherwise.

THESE are the Errors which have been objected: And *This* the Manner and Form in which they are assigned. For the Reasons I have given, I can not allow *any* of them. It was our Duty, as well as our Inclination, sedulously to consider whether upon any *other* Ground, or in any *other* Light, we could find an Informality which we might allow with Satisfaction to our own Minds, and avow to the World.

But here, Let me pause! —

It is fit to take some Notice of the various Terrors being out; the numerous Crowds which have attended and now attend in and about the Hall, out of all Reach of hearing what passes in Court; and the Tumults which, in other Places, have shamefully insulted all Order and Government. Audacious Addresses in Print dictate to Us, from Those they *call* the PEOPLE, the Judgment to be given *now*, and afterwards upon the Conviction. Reasons of Policy are urged, *from Danger to the Kingdom*, by Commotions and general Confusion.

Give me Leave to take the Opportunity of this great and respectable Audience, to let the whole World know, *All such Attempts are VAIN*. Unless we have been able to find an Error which bear us out, to reverse the Outlawry; it must be affirmed. The Constitution does not allow Reasons of State

to influence our Judgments: God forbid it should! we must not regard *Political Consequences*; how formidable soever they might be; If Rebellion was the certain Consequence, we are bound to say "*Fiat Justitia, Ruat Cælum.*" The Constitution trusts the King with Reasons of State and Policy, *He* may stop Prosecutions; *He* may pardon Offences; it is *his*, to judge whether the Law or the Criminal should yield. *We* have no *Election*. None of *Us* encouraged or approved the *Commission* of either of the Crimes of which the Defendant is convicted: None of us had any Hand in his being *prosecuted*. As to *myself*, I took no Part, (in another Place,) in the Addresses for that Prosecution. *We* did not advise or assist the Defendant to fly from Justice: It was his *own Act*: And he must take the Consequences. None of us have been consulted or had any Thing to do with the present Prosecution. It is not in *our Power*, to stop it: It was not in *our Power*, to bring it on. *We* can not pardon. We are to say, what we take the Law to be: If we do not speak our *real Opinions*, we prevaricate with God and our own Consciences.

I pass over many *anonymous Letters* I have received. Those in *Print* are public: and some of them have been brought judicially before the Court. Whoever the Writers are, they take the *wrong Way*. I will do my Duty, *unawed*. *WHAT* am I to *fear*? That *mendax infamia* from the *Press*, which daily coins *false Facts* and *False Motives*? The Lies of *Caulomy* carry no Terror to me. I trust, that my Temper of Mind, and the Colour and Conduct of my Life, have given me a Suit of Armour against *these Arrows*. If, during this King's Reign, I have ever supported his Government, and assisted his Measures; I have done it without any other Reward, than the *Consciousness* of doing what I thought *right*. If I have ever opposed, I have done it upon the Points themselves; without mixing in *Party* or *Faction*, and without any *collateral Vieu*s. I honour the King; and respect the People: But, many Things acquired by the *Favour of either*, are, in *my Account*, Objects *not worth Ambition*. I wish *POPULARITY*: But, it is *that Popularity*, which *follows*: not that which is *run after*. It is *that Popularity*, which, sooner or later, never fails to do justice to the Pursuit of *Noble Ends*, by *Noble Means*. I will not *do* that which my *Conscience* tells me is *wrong*, upon this Occasion; to gain the Huzzas of Thousands, or the daily Praise of all the Papers which come from the *Pres*: I will not *avoid doing* what I *think is right*; though it should draw on me the whole Artillery of *Libels*; All that Falsehood and Malice can invent, or the Credulity of a deluded Populace can swallow. I can say, with a great Magistrate, upon an Occasion and under Circumstances not unlike, "*Ego hoc animo semper fui, ut Invidiam Virtute par-*
" *tam, Gloriam, non Invidiam, putarem.*"

The

The Threats go further than Abuse: PERSONAL Violence is denounced. I do not believe it: It is not the Genius of the worst of Men of *this Country*, in the worst of Times. But I have set my Mind at Rest. The last End that can happen to any Man, never comes too soon, if he falls in Support of the Law and Liberty of his Country: (For, Liberty is synonymous to Law and Government.) Such a Shock, too, might be productive of public Good: It might awake the better Part of the Kingdom of that Lethargy which seems to have benumbed them; and bring the mad Part back to their Senses, as Men intoxicated are sometimes stunned into Sobriety.

Once for all, Let it be understood, "that no Endeavours of *this Kind* will influence any Man who at present sits here." If they had any Effect, it would be contrary to their Intent: Leaning against their Impression, might give a Bias the other Way. But I hope, and I know, that I have Fortitude enough to resist even that Weakness. No Libels, no Threats, nothing that has happened, nothing that can happen, will weigh a Feather against allowing the Defendant, upon this and every other Question, not only the whole Advantage he is intitled to from *substantial Law and Justice*; but every Benefit from the most critical Nicety of Form, which any other Defendant could claim under the like Objection. The only Effect I feel, is an Anxiety to be able to explain the Grounds upon which we proceed; so as to satisfy all Mankind "that a Flaw of Form given way to in this Case, could not have been got over in any Other."

FROM the PRECEDENT we have seen, it appears, that a Series of Judgments have required a technical Form of Words, in the Description of the COUNTY-COURT at which an Outlaw is exacted: That after the Words "*at my County-Court.*" should be added the NAME of the County: and after the Word "*held,*"—should be added—"for the County of —," (naming it.) Whereas here, the Sheriff says "*at my County Court,*"—without adding—"of Middlesex." And he says—"held at the House, &c." without adding the Words "*for the County of Middlesex.*" after the Word "*held.*"

As to the first Expression, The Cases begin as far back as the 7th of James the 1st. As to the second Expression, They begin about the 18th of October the 2d.

If we are compelled by Authority, to look upon either Expression as technically necessary, it is sufficient upon this Occasion; because, here, Both are wanting.

* P. 7. Jac. If an Outlawry be returned in this Manner—“*Ad Com. 2 Ro. Abr. “meum tent. apud Cicestriam in Comitatu Sussex &c.”*” it is 302. White erroneous; because it is not said “*Ad Com. meum Sussex return. &c.*” * Alder was outlawed for Murder; And it was † Mich. 16. moved for Error, that the Sheriff returned—“*Ad Com. meum Cafe,* “*tentum apud D. in the County of Northumberland,*” and 2 Roll’s Re. did not say “*ad Com. meum Northumbriæ, tentum, &c.*” 52. ports 52. And this was holden to be Error. † Among the Errors for † Tr. 15 C. 2. which, the Reporter says, the Outlawry was reversed, the 1 Keble 50. seond is—Not said “*Suffolciae,*” after “*Com. meum:*” And 51. Rex v. Siclemore. this, he says, had been a common Exception † Three Co- & Rex v. pies have been left with us, from the Records: And they are Hallet. H. “*ad Com. meum § Middlesex tent. &c.,*” agreeable to the 22, 23 C. 2. Judgments I have mentioned *Winnington* assigned Error rotulo 16. of Outlawry: And one, said to be allowed, was “*that the Rex v. Pref. Court is said to be held at the County of Hereford;* and ton, H. 22, doth not say—“*for the County.*” || An Outlawry was re- 23 C. 2. rotulo 17. Rex v. Vernatt. “*pro Comitatu.*” * This Term, several Outlawries were H. 1. 2 J. 2. reversed, for want of “*pro Com.*” or *nec eorum aliquis*” rotulo 9. or “*per judicium Coronatorum.*” † One who was outlawed || M. 18 C. 2. for the Murder of Sir Edmonbury Godfrey, now brought a Rex v. Tuf- Writ of Error in his Hand to the Bar; praying “*that it ton. 2 Keble 328. might be read and allowed.*” The Outlawry was reversed.

* H. 22, 23. Among the Errors assigned, One was “*that it did not appear C. 2. 1 Vent.*” the Court was held *pro Comitatu.*” The other was clearly 108. anonymous a fatal Objection. † After stating the Case, Sir Bartholomew Shower says—“*She brings a Writ of Error, to reverse the 1 E. 31 Car. “Outlawry: And the Error which I assigned ore tenus, was 2. 2 Shower 60. “the usual Fault, in not saying the County-Court was held 60.*”

† H. 1 J. 2. “*pro Comitatu.*” The Outlawry was reversed. § This is a 3. Mod. 89. very strong Authority, to shew that in the third of W. & M. anonymous, it was settled “*that the Words pro Comitatu were technically (S.C. as Rex “necessarii.” A Record of an Outlawry has been found, agree- v. Vernatt, able to this Form established as necessary; and says—“ Ad leftwithus “*Com. meum tent. pro Com. Middlesex, apud le Cheshire- from the “Cheese in Gray’s-Inn-Lane in Com. prædict.*” **

§ M. 3 W. & M. 1 Show. No Case, Report, or Record has been found, since the third 1697. 209. Rex v. of Queen Ann, which can be of any Use, either way, upon Lady Oneby this Point, or any of the Errors assigned.

alias Tru-

der. The Authorities I have stated stand, to this Day, uncon-

* Tr. 9 W. 3. tradieted. They are many; and have prevailed above a Century. 1697. rotulo I think, they *begun* against Law and Reason. The former 2 Rex v. Bell. Authorities were otherwise: The Precedent in Dalton is other- wise. There is no Reason for requiring these Words: There is sufficient Certainty, without them. It is impossible to doubt, upon this Record, but that the County-Court at

which

which the Defendant was exacted, was the Court *of* and held *for* the County of Middlesex. But this is a Criminal Case, highly Penal. Outlaws have had the Benefit of the Exception, for a great Length of Time. Can we refuse it to the Defendant: We *can not*: Though I am clearly of Opinion, "there was not a Colour, *originally*, to hold these Words "to be necessary," The Objection to the Blunder between the Peace "of the *new*," and "the *late* * King," after Con- * Vide viction, has not much more Solidity in it: Yet the House of Lookup's Lords thought themselves bound by Precedents. And so must Case. we, had the Flaw been discovered before Judgment. I *can not* say, "that it does *not appear* upon this Record, that "the Court was *of* and held *for* the County of Middlesex:" because I am clearly of Opinion "that, most manifestly, it "does." But I *can* say, that a series of Authorities, unimpeached and uncontradicted, from the 7th of James the First, as to One Expression, and from the 18th of Charles the Second, as to the Other, have said "such Words are *formally* "necessary:" I *can* say, that *such Authority*, though begun without Law Reason or Common Sense, *ought to avail* the Defendant. It would be dangerous, to say that any Exception *allowed so long*, should now be over-ruled. The Exception certainly would not have prevailed, had it been opposed at first: But, before the 3d of Queen Ann, there being no Opposition after a Writ of Error was granted, the Court considered the Crown as consenting to the Reversal upon *any* Pretence, how slight soever. Though that is *not* the Case *now*, The *Necessity of the Form of Words* must not be canvassed: since it has been *so often adjudged* necessary. The Officers of the Crown are in Fault, for not attending to the Forms prescribed, and copying the Precedent of the *King v. Bell*.

There can no Mischief or Incertainty arise from this Determination; because it being once known "what Form of "Words is necessary," it is easy to follow it. But great Suspicion and Incertainty must follow, from this Court's *allowing* a formal Exception One Day, and *disallowing* it another.

I beg to be understood, that I ground my Opinion *singly* upon the Authority of the Cases *adjudged*; which, as they are on the favourable Side, in a Criminal Case highly Penal, I think ought not to be departed from: And therefore I am bound to say that, *for want of these technical Words*, the Outlawry ought to be reversed.

THE OTHER THREE JUDGES spoke *seriatim*. But, as their Arguments tended to support and illustrate the same Doctrine which his Lordship has laid down; and as they did not differ, in any Part, from the Opinion given by his Lordship; I omit, for the sake of Brevity, reporting particularly what they said.

A RULE

A RULE was accordingly made (in each Cause)
 " that the Outlawry be REVERSED."

On the same 8th of June 1768,

RULES were made, for the Prosecutor, to shew Cause (upon Tuesday then next) why the Judgment should not be arrested; and why the Verdict should not be set aside.

And also a RULE for now remanding the Defendant to the Custody of the Marshal, and for bringing him into Court again on Tuesday next.

Accordingly, on Tuesday the 14th of June 1768, the Two following Points were argued, very strenuously and very copiously on both Sides; namely, "Whether the Informations could be exhibited by the Solicitor-General;" and "Whether the Amendment could be made by a single Judge out of Court, in the Manner before specified." The former was objected to, as a Ground for arresting the Judgment: The latter, as a Ground for a new Trial.

LORD MANSFIELD, as to the Motion in Arrest of Judgment, adhered to the Opinion he had before given, "that the Informations were well exhibited by the Solicitor-General."

As to the Motion for a new Trial on account of the Amendment, he declared his Satisfaction at the Motion's having been made, and the Matter so fully discussed and understood.

Matters of Practice, he observed, are not to be known from Books. What passes at a Judge's Chambers is Matter of Tradition: It rests in Memory. In Cases of this Kind, Judges must inquire of their Officers. This is done in Court, every Day, when the Practice is disputed or doubted. It is, in its Nature, Official. The Officers are better acquainted with it, than the Judges. For his own Part, neither his Education, nor his Walk in Life before he came into this Court, ever led him into any Knowledge of the Practice of Orders made by Judges in the Vacation. The making this Order for the Amendment appeared to him to be right, and to be a Matter of Course. It came to him as a Matter of Course, and recommended as such from a Gentleman of great Experience, who (he knew) would as soon have cut off his right Hand, as have deceived him by representing this as a Thing of Course, when it was not so. Accordingly, he issued a Summons, "to shew Cause why the Amendment should not be made." A Summons always issues, before a Judge makes an Order.

Order. A Summons, therefore, went out, of Course. Upon the Attendance, his Lordship asked Mr. *Hughes*, (an old and experienced Officer,) the Defendant's Clerk in Court, "whether there was any Doubt but that this was amendable." He, very rightly, and as was his Duty, admitted "that it *was* amendable, and that he could not say otherwise." His Lordship then took down a Book in which were entered some Cases where Informations were amended by a Judge's Order, just before Trial; and after reading one or two, Mr. *Philips*, the Defendant's Attorney, desired him, not to give him any farther Trouble. Mr. *Philips* said, indeed, "that he could not Consent to it." But he did not object to it, nor contradict it; nor was it objected to, at the Trial. The Counsel saw that there could be no Objection made to the Order,

Mr. Justice BLACKSTONE, in his Third Volume, * gives ^{*Book 3. c.} the Rise and History of Amendments, very shortly and in a few ^{25. P. 407.} Words. He shews how it stood, before the Reign of *Edward* the First; in whose Time (probably about the 13th Year,) *Britton's Treatise* was published, in the King's Name and by the King's Authority: Which seems intended to give a Check to the unwarrantable Practices of some Judges who had made false Entries on the Rolls, to cover their own Misbehaviour: And about the 18th Year of his Reign, almost all the Judges, even the most able and upright, were prosecuted by him; and some of them very heavily fined; and One of the Causes assigned for it, was erasing and altering Records: Particularly, Sir *Ralph Hengham* was fined 800 Marks at least, (some say 7000.) for altering, out of mere Compassion, a fine set upon a very poor Man, from 13s 4d. to 6s. 8d. Upon this, the Judges grew so strict, that after Inrollment they would not amend their Judgments, even to set them right. They were so alarmed by this Severity, that through a Fear of being said to do wrong, they hesitated at doing that which was right; and because criminal and clandestine Alterations, to make a Record speak a Falsity, were forbidden, they conceived that they might not judicially and publickly amend it, to make it agreeable to Truth. But Declarations and Pleas might always be amended at any Time: It was only *Inrollments* that were prohibited by *Britton*. There never was any Distinction, (as to Amendments at the Common Law,) between Criminal and Civil Causes; that it is before the ^{† 8 H. 6.} of Jeofails. The Judges adhered to such Strictness, that Justice was entangled in the Net of Form. The ^{† 8 H. 6.} 12. Legislature was therefore forced to interpose: And no less than Twelve Statutes of Amendment were made, to remedy these opprobrious Niceties.

The fundamental Question here is, "Whether an Information may be amended, at Common Law, at the Desire of the Crown, after Plea pleaded."

Numberless Precedents are produced, from the Time of Queen Elizabeth, and all through the Reigns of James the First and Charles the First; and many Side-Bar Rules, which shew that it was of Course: For, if it were not of Course, it would have been moved in Court, as every Thing not of Course is.

So long ago as 6 W. 3. Lord Chief Justice Holt treats it as a known Thing, a Thing of Course. 1 Salk. 47. *The King against Harris.* A Motion was made, to amend an Information for Perjury; and opposed, because the Defendant had pleaded. *Et per Holt Chief Justice* "As to Amendment after Plea pleaded, there is no great Matter in that. After a Record has been sealed up, I have known it amended, even just as it was going to be tried." In 12 W. 3. * Sir

^{* 1 Salk. 50.} *Bartholomew Shorwer* moved to amend an Information of Forgery, in Ten Places: And, though opposed, the Motion was granted, because it made no Alteration of the Fact; and that, without Costs or Impariment. In the Case of *The King against Charleworth*, 2 Str. 87. the Information was for forging a Warrant of Attorney to acknowledge Satisfaction upon a Judgment of Easter Term: And, after Issue joined, the Record appearing to be of Hilary Term, the Information was amended, without Costs, (the Prosecutor having been admitted a Pauper,) and without giving the Defendant Leave to plead *de novo*. And *Hil. 10 Ann. The Queen against Simmonds* was there cited; where the Title of an Act set forth to the Contrary. There can be no Doubt therefore of its being amendable; upon the Authority of a Series of Precedents, without any Objection, and all these printed Cases contradicted.

And why should it not be amended? If it had not been amended, the Attorney-General would have dropped this Information, if he thought there was a Slip in it; and have brought another. And this would have been more inconvenient to the Defendant, and have harrassed him more: He would have no Benefit, and more Vexation. This Amendment avoids Delays, and saves Expences: It saves the Defendant the Expence of bringing his Witnesses up again. The Attorney-General pays no Costs. The Defendant never asked Leave to plead again, or to have the Trial put off: Nor was there any Cause for it. The Defence was not at all varied. The Substance of the Charge was not at all altered: It remained the *very same*. The true Merits of the Cause stood the *very same*. There is no Difference at all, but that

the

the Prosecutor must *prove more*. The Nature of the Paper was the same: Every Objection was equally open to the Defendant, and he had the further Advantage of any verbal Slip in setting out the Libel upon the Record.

But it is objected, "that it could not be done *out of Court*."

Answer. It might be done by the Court: It might be done at the Side-Bar. And a great Deal that may be done in Court, is done by Judges at Chambers, in Term-Time: In Vacation, a great Deal more is done by them at Chambers; because it can be done no where else. Most of the Precedents of Amendments before Trial are in the Vacation. Lord Chief Justice *Lee* amended a Record of an Information, sent up from *Yorke*; the Mistake being there discovered during the Assizes: And the Record so amended was returned, and immediately tried. I am obliged to a Gentleman at the Bar, who sent me a Case of *The King against King*, 19th of *March* 1746, where Mr. Justice *Foster* ordered the Word "*Division*" to be struck out, and "*Parish*" to be inserted; though it was strenuously opposed, and the Defendant must have been acquitted, if it had stood unamended. Mr. Justice *Foster* had applied himself particularly to the Crown Law; was a strict adherer to legal Forms; and had more Experience in Business proper to be done out of Court, than any other Judge.

"Whether it was a *necessary* Amendment, or not," I give no Opinion, nor form any.

There is a great Difference between amending *Indictments*, and amending *Informations*. Indictments are found upon the Oaths of a Jury; and ought only to be amended by themselves: But Informations are as Declaration in the King's Suit. An Officer of the Crown has the Right of framing them originally: and may, with Leave, amend, in like Manner as the Plaintiff may do. If the Amendment can give Occasion to a *new Defence*; the Defendant has Leave to change his Plea: If it can make no Alteration as to the Defence, he don't want it. In this Case, the Defendant could not possibly plead *any other* Plea.

I am fully satisfied, that none of the Defendant's Counsel or Agents ever thought there was the least Colour of Objection to the Order for Amendment: But, long after the Trial, it occurred to Others, that by calling it "*an Alteration of the Record*," instead of "*an Order to amend the Information*," they who derive all their Knowledge and Law from Libels in the News-Papers, might be bewildered and misled.

Mr.

Mr. Justice YATES took Notice of a Difference which there seemed to him to be, between the Attorney-General, and the Master of the Crown Office : The Attorney-General is the Officer of the King ; the Master of the Crown-Office, the Officer of the Public. Informations exhibited by the King's Attorney-General are considered as the King's own Prosecutions, and are called "Declarations for the King :" Therefore no Costs are paid upon them. In the other Informations, Costs are often payable.

He said, he was greatly confirmed in his Opinion, upon the Case now before the Court, and had the greater Reason to think it a right One ; as his Brother Glynn had not, by all his Arguments, been able to shake it.

He agreed, that the Statute-Power of amending does not extend to Criminal Proceedings : But in Common-Law Amendments, there is no Difference between Criminal and Civil Proceedings. And he cited, and repeated (in Part) the Case of *The Queen against Tutchin*, in 6 Mod. 268 to 287.* He cited also, to the same Purport, the Case of *Bondfield qui tam &c. v. Milner*, in this Court, M. 1. G. 3. (*Vide ante*, p. 1098, 1099.)

The Question therefore turns upon *what is a Common-Law Amendment.*

Many Cases have been cited, of Common-Law Amendments. But there is One, which has not been mentioned : It is *The King against Goffe*, in 1 Lev. 189. It was moved to amend an Information of Perjury. And it was ruled, that they should give Notice of the Things to be amended, to the Defendant ; and he to shew Cause why it should not be amended : For, the Court, said, "it might be amended." The Case of *The King against Charlesworth* was a very strong One : For, the Defendant must have been acquitted ; And yet that Amendment was made without Payment of Costs, and without Liberty to plead *de novo*.

Indictments, being upon *Oath*, can not be amended. But Informations may be amended ; because they are *Declarations for the King*. 2 Viner 394, Title, "Amendment and Jeo-
" fails," pl. 12. 12 Mod. 229. *The King against Lewis*. 6 Mod. 281. 1 Stra. 185. *Rex v. Nixon*.

It is clear, therefore, that Informations *may be amended* at Common-Law.

As to their being amended by a *Judge at Chambers*—It is, most certainly, the PRACTICE, *Non constat*, "when it begun ?"
But

But it seems to have been exercised Time out of Mind ; and that the Business of the Court could not be done without it. The Business done at Chambers is the most irksome Part of the Office of a Judge : But it is greatly for the Benefit of the Subject, and tends to the Advancement and Expedition of Justice. It arises from the Overflowing of the Business of the Court : which can not be all transacted *in Court*. The Order of a Judge is subject to an Appeal to the Court : But if acquiesced under, it is as valid as any Act of the Court. It is common, to apply to the Court, " to discharge a Judge's Order : But the very Course of applying to the Court, " to discharge the Order of a Judge, made at Chambers," supports the Proceeding ; and shews that the Order is valid as to its Effect, if it be not discharged. Indeed, if it becomes necessary to enforce it by Attachment, there must be a Motion " to make it a Rule of Court." The Validity of a Judge's Order can be impeached only two ways : either by appealing to the Court, to set it aside ; or, if made in Vacation, by applying in the next Term, to set aside the Proceedings that have been had under it. Now, this Order was made in Vacation. The Defendant might have declined going to Trial, and might have moved, in the next Term, " to set aside the Verdict." But he acquiesced, and went to Trial.

The Materiality of this Amendment is not in any degree equal to many of those that were made in the Cases that have been cited. The Defence was, indeed, *made easier* thereby : For, the Word " *Tenor*" imports a *literal Copy*. It could not vary the *Nature* of the Defence : The Proof lay upon the *Crown*. If the Defendant had had an Objection to the Alteration, he should have made *no Defence at the Trial* : That would have been a consistent Conduct. But as he *did make a Defence*, he has *acquiesced in it*. And yet, if he had made *no Defence at the Trial*, the Verdict nevertheless would have stood : For, it could not have been set aside, *unless the Order was a bad One* ; which it now clearly appears, " that " *it was not.*" Therefore it ought to be supported by the Court.

This is a Motion for a new Trial, *after* a Series of Proceedings upon it. The Court have indeed spontaneously relaxed their own Rule, in order to give an Opportunity of having this Matter fully and fairly argued and considered : Which I am glad of ; but I hope, it will not be made a Precedent.

Mr. Justice ASTON—I entirely concur with my Lord and my Brother YATES, in discharging these Rules. I think, the Importance of this Case does not consist in the Nature of it; but in the Noise and Clamour that it has occasioned, and the Misrepresentations that have been thrown out to the Public,

lic, of the Conduct of the Judges in the Course of the Proceedings in it; who have been very unjustly charged with being induced to it by partial Motives.

In the Case of *The Queen and Norton*, reported in Lord Fortescue's Reports 232, in Court agreed that it is a General Rule, "to amend Informations at any Time, even just before Trial :" But then it must not make the Information different. And, to be sure, it ought not : For, it would make a different Defence. In the Case of *Rush and Seymour*, Mod. 88. it is said, "that Statutes of Amendment extend only to Pleadings of Record ; and that Pleadings, while in Paper, are amendable by Common-Law ; and that it is a Motion that the Court can not refuse : But they may refuse it, if the Party desiring it refuse to pay Costs, or the Amendment desired should amount to a new Plea." And as to the Practice, it was almost of Course, where the Amendment made no Alteration in the Defence. Where it altered the Defence, then it was upon Terms. There is nothing that I ever looked upon as so plain.

Then as to doing it *at Chambers*—The Practice of the Court has been always so. The Business done at Chambers is become an immense Load upon the Judges, and is exceedingly troublesome to them : But it is the Practice, the Custom of the Court ; and therefore, the Law of the Land. And what has been done by the Judge at Chambers, in the present Case, has been rightly done : If it had not, I should have had no Scruple in overturning it. But here is not the last Colour for that : The Order is justified by a vast Number of Precedents. I am glad, that it has been thus fully discussed ; to convince the great Number of Persons that I see attending here, that Judges have acted in this Case, as they do in all Others ; and that there is no Sort of Ground for the scandalous Intimations that have been industriously propagated, of their having been influenced by partial or improper Motives.

Mr. Justice WILLES concurred in both Points.

He declared himself to be clearly of Opinion that during the Vacancy of the Office of the King's Attorney-General, (which was the present Case,) the Power of the Attorney-General devolves upon the Solicitor-General for the Time being. Consequently, this Information was regularly and properly exhibited.

As to the Order of the Amendment of the Information—He held it to be justified by an uninterrupted Series of Precedents, from the Time of W. 3. at least. And as the Order was right, he saw no Ground for the Obloquy that had been thrown

thrown upon the Noble Person who made it. It makes no Alteration in the Charge: It makes no Alteration in the Defence. No Objection was made to it: No Advantage was taken of it. It was acquiesced in: And the Cause went on to Trial. It is authorized by several Cases, and by a great Number of Precedents for many Years backward. He grounded his Opinion, he said, upon the Chain and Series of Precedents for near a Century past.

He concurred therefore with his Lordship and his Brothers, that Both Rules be discharged.

THE COURT unanimously ordered Both these Rules to be DISCHARGED.

Serjeant *Glynn* thereupon moved, that the present Proceedings might be entered upon Record; that the Defendant might have Opportunity of applying to another Jurisdiction.

THE COURT told him, They could not go out of the usual and ordinary Method and Course of Proceeding: Every Thing must be done in this Case, in the same Manner as in all other Proceedings of the like kind.

Mr. Attorney-General then moved for LORD MANSFIELD'S Report of the Evidence; (the Causes having been tried before his Lordship, at nisi prius.)

Whereupon, After the Records of the Conviction had been read,

LORD MANSFIELD reported the Evidence in each Cause.

The Attorney-General and the Serjeant made their respective Observations upon the Evidence reported.

Mr. *Wilkes* then applied for the Sentence of the Court.

THE COURT told him, it was necessary to take some Time to consider of it: The constant Course is so. They promised to do it without Delay; and to give Mr. *Wilkes* Notice, when they were ready: But, at present, they had not had the least Conference together about the Punishment; nor could they, without great Impropriety, have had any, before they had heard all the Arguments.

Serjeant *Glynn* then hinted at his Client's being bailed in the mean Time.

But THE COURT told him, he knew that could not be done.

The

The Defendant was REMANDED to the Custody of the Marshal.

On Friday the 17th of June 1768,

THE COURT declared their Intention of giving final Judgment to Morrow ; and ordered that the Defendant should be brought up accordingly.

On Saturday the 18th of June 1768,

Mr. Justice YATES (as second Judge) pronounced the Sentence of the Court in each Cause ; viz.

On the Information for the *North Briton* No. 45. a Fine of 500*l.* and Imprisonment for Ten Calendar Months, and till the Fine be paid : On the other Information, 500*l.* Fine ; And Imprisonment for Twelve Calendar Months after the Expiration of the former Ten ; and to find Security for his good Behaviour for Seven Years, himself in 100*l.* and Two Sureties in 500*l.* each ; and to be remanded, till the Fine should be paid and such Security given.

Mr. Wilkes desired, that his former Imprisonment might be considered in the Punishment now inflicted upon him.

THE COURT assured him " that it had been so ; and " that they had fully considered all Circumstances, both for " him and against him."

Serjeant Glynn then desired, that Mr. Wilkes might have the Benefit of a Writ of Error to the House of Lords.

LORD MANSFIELD answered, That this Court could not give any particular Directions about that Matter : He must apply to the Attorney-General. And he added, That if Mr. Attorney-General would take his Advice, he should grant it the Moment it was applied for.

Mr. Attorney-General said, he certainly should grant it immediately.

Mr. Wilkes then desired, that it might be put into such a Method, as that he might have the Advantage of objecting, in the House of Lords, to the Alterations made in the Record by LORD MANSFIELD at his Lordship's own House.

LORD

LORD MANSFIELD told him, that the Court could not alter the Law.

Mr. Wilkes replied, that he did not wish the Law to be altered.

LORD MANSFIELD—It is impossible to alter it in any particular Case : The same Course must be taken in this Case as is usual in others of the like kind. The Defendant's Counsel would advise him, his Lordship said, what were the proper Steps for him to take, in Order to have the Opinion of the House of Lords.

The Defendant was REMANDED.

THE RULES were drawn up in these Words—

* Saturday next after Fifteen Days from the Day of the *(18th June
Holy Trinity, in the Eighth Year of King George the Third, 1768.)

The Defendant being brought here into Court in Custody Middlesex, of the Marshal of the Marshalsea of this Court, by Virtue of The King a Rule of this Court, and being convicted of certain Trif-^{against John} Wilkes Esq. passes Contempts and grand Misdemeanours, in printing and publishing a seditious and scandalous Libel, intitled "The "North Briton, No. 45." whereof he is impeached, It is Ordered that he the said Defendant, for his Offences aforesaid, do pay a Fine to our Sovereign Lord the King, of Five Hundred Pounds of lawful Money of Great Britain : And it is further Ordered, that he the said Defendant be imprisoned in the Custody of the said Marshal for the Space of Ten Calendar Months now next ensuing. And it is lastly Ordered, that the said Defendant be now remanded to the Custody of the said Marshal, to be by him kept in safe Custody, in Execution of the Judgment aforesaid, and until he shall have paid the said Fine.

On the Motion of Mr. Attorney-General.

By the Court.

The Defendant being brought here into Court, in Custody The same of the Marshal of the Marshalsea of this Court, by Virtue against The of a Rule of this Court; and being convicted of certain Tres-^{fame,} passes Contempts and grand Misdemeanours, in printing and publishing an obscene and impious Libel, intitled "An Essay "on Woman," and other impious Libels in the Information in that behalf specified, whereof he is impeached ; and having also been convicted of certain other Trespasses Contempts and

and Misdemeanours, for printing and publishing a certain other Libel, intituled "The *North Briton*, No. 45." for which he hath this Day been sentenced, and ordered by this Court to pay a Fine of Five Hundred Pounds and to be imprisoned in the Custody of the said Marshal for the Space of Ten Calendar Months; It is now Ordered by this Court, That the said Defendant, *for his Trespasses Contempts and Misdemeanours first abovementioned, in printing and publishing the said obscene and impious Libels, do pay a further Fine to our Sovereign Lord the King, of Five Hundred Pounds of lawful Money of Great Britain; and that the said Defendant be further imprisoned in the Custody of the said Marshal, for the Space of Twelve Calendar Months to be computed from and after the Determination of his aforesaid Imprisonment for printing and publishing the said other Libel intituled "The *North Briton* No. 45." And it is further Ordered that he the said Defendant shall give Security for his good Behaviour for the Space of Seven Years, to be computed from and after the End and Expiration of the said Twelve Calendar Months to be computed as aforesaid; to wit, himself, the said Defendant, in the Sum of One Thousand Pounds, with two sufficient Sureties, in Five Hundred Pounds Each. And it is lastly Ordered, that he the said Defendant be now remanded to the Custody of the said Marshal, to be by him kept in safe Custody, in Execution of this Judgment, and until he shall have paid the said Fine and given such Security as aforesaid.

On the Motion of Mr. Attorney-General.

By the Court.

Afterwards, a Writ of Error was brought, returnable in Parliament, upon each Judgment: And Both Judgments were affirmed, as follows—

Die Lunæ 16th January 1769.

Counsel having been fully heard to argue the Errors assigned in these Causes, the following Questions were put to the Judges—

" Whether an Information filed by the King's *Solicitor-General*, during the Vacancy of the Office of the King's *Attorney-General*, is good in Law."

" Whether, in such a Case, it is necessary in Point of Law, to aver upon the Record, that the *Attorney-General's* Office was vacant."

Upon the second Record—

" Whether

" Whether a Judgment of Imprisonment against a Defendant, to commence from and after the Determination of an Imprisonment to which he was before sentenced for another Offence, is good in Law."

Whereupon, the Lord Chief Justice of the Court of Common Pleas, having conferred with the Rest of the Judges present, delivered their unanimous Opinion upon the said Questions, with their Reasons.

To the First Question—That an Information filed &c, is good in Law.

To the Second—That in such a Case, it is *not necessary*.

To the Third—That a Judgment of Imprisonment &c, is good in Law.

Then ORDERED and ADJUDGED That the Judgments of the Court of King's Bench be AFFIRMED.

On Wednesday the 7th of February, 1770,

Mr. Davenport moved that the Defendant might be brought up, either into Court within this Term, or before a Judge at Chambers after the End of it; to enter into the Recognizance required of him by the abovementioned Rule of Court: * For, his Imprisonment will end upon a Day which does not fall within any Term; namely, upon Easter Vide ante,
Tuesday next. p. 2576.

THE COURT told him, They had thought of this already: And they conceived the best Method would be, to make a Rule for his entering into the Recognizance before the Marshal, or some other Justice of the Peace for the County of Surry.

And accordingly, they ordered such a Rule to be drawn up: Which was done in these Words—

ORDERED, that at the Expiration of the Imprisonment of the Defendant, by Virtue of the Judgment of this Court pronounced against him in this Cause on Saturday next after Fifteen Days from the Day of the Holy Trinity in the 8th Year of the Reign of his present Majesty, the Security required by the said Judgment to be given by him the said Defendant for his good Behaviour for the Space of Seven Years, to wit, himself the said Defendant in the Sum of 1000l. with two sufficient Sureties in 500l. Each, may be taken by and before any Justice of the Peace of and for the County of Surry.

Perrin and Another, *versus* Blake, Widow.

Thursday,
8th Febru-
ary, 1770.

THIS was a Demurrer to a Replication, in an Action of Trespass: And the Question was "Whether *John Williams* took an Estate for *Life*, or an Estate *Tail*, under his Father's Will."

The Testator, *William Williams*, at the Time when he made his Will, had only this One Son *John*, and Two Daughters: But he thought his Wife to be then with Child. However, there never was any other Child: And one of the Daughters was since dead, without issue. One Clause of the Father's Will says—" Provided that should my Wife be ensient with Child, and it be a Female, I give her 2000l. And if a Female, I give my Estate, real and personal, equally to be divided between said Infant and my Son *John*, when said Infant shall attain his Age of Twenty-One Years." In another Clause of it, the Testator declares it to be his Intent "that none of his Children shall sell his Estate for longer than his Life:" And to that Intent, he gives all his Estate to his said Son *John* and said Infant for their Lives; Remainder to Trustees, to preserve contingent Remainders &c; Remainder to the Heirs of the Bodies of his said Sons; Remainder to his Daughters, for their Lives; Remainder to Trustees &c; Remainder to the Heirs of the Bodies of his Daughters; And that the Share and Part of his said Daughters, if either of them should die, should immediately vest in the Heirs of their Bodies. The Defendant claimed under the Remainder to the Daughters; *John being dead*. The Plaintiff stated in his Replication, "that *John* before his Death entered, and suffered a Recovery, to the Use of himself in Fee; and afterwards devised to the Plaintiff, for a Term of Years;" Under which Demise, the Plaintiff derives his Title. The Defendant insists that this is a bad Title; because *John* took only an Estate for *Life*, and therefore could not suffer a Recovery.

No Doubt was made of the Rule in *Shelley's Case* in *Coke on Littleton* and other Books * "that when the Ancestor by any ^{1 Co. 104. b} Gift Devise or Conveyance, takes an Estate for *Life*, with ^{Co. Lit. 22 b} Remainder mediately or immediately to his *Heirs* in *Fee*, & ^{319. b} or in *Tail*; the Word *Heirs* is a Word of *LIMITATION*; and the Estate of Inheritance shall *vest in the Ancestor*; and the express Limitation for *Life* is of no Effect."

The REASON of the Rule (as it is generally agreed) was to preserve to the Feudal Lords the Fruits of the Seignory

upon the Deaths of their Tenants. If an Estate could have been limited to the Ancestor for Life, Remainder to his Heirs, the Ancestor might have acted during his Life as absolute Owner, and conveyed the Estate so as to destroy the contingent Remainder: And if he chose that it should go to his Heir, the Heir would have taken it as a *Purchaser*, and consequently not liable to Wardship Marriage or Relief. But the Policy of the Law said "This shall not be."

Though the Reason of the Rule has now ceased, and a contingent Limitation to the Heir of a Tenant for Life may now be preserved against his Act, and Feudal Tenures are now in Effect abolished; yet the Rule having been established, it was conceded, that it must be adhered to: And where there is nothing more in the Case, than a Devise to *A.* for Life, and afterwards to the Heirs of his Body, it was admitted on all Hands "that *A.* took an Estate Tail."

The Counsel for the Plaintiff did not dispute but that upon this Will there were Words which shewed the Testator's Intent to devise his Estate in strict Settlement. The Testator expressly declared "that he meant that none of his Children should sell for longer than his Life;" And to that Intent, devised to Trustees, to preserve contingent Remainders: Which seems equivalent to his saying "They should not have an Estate Tail;" "and that the Heir should take a contingent Remainder by such Description, as a *Purchaser*, which his Ancestor had no Power to alien." If the Heir was to take the Inheritance by Succession, there could be no contingent Remainder to preserve; and his Ancestor might alien. Therefore the Counsel for the Plaintiff did not dispute the Intent: But they contended, that be the Intent ever so plain from other Parts of the Will, the Rule holds "that the Inheritance must vest in the Ancestor."

The Counsel for the Defendant contended, that if the Testator's Intent was manifest from other Parts of the Will, "Heirs" might be construed a Word of Description; and the Heir should take the Inheritance as a *Purchaser*. That such a Devise was contrary to no Rule of Law. That a Testator might limit in this Manner, by apt Words; And if the Testator's Intent be clear, and what he intends be agreeable to the Rules of Law, it shall be executed; in what Manner soever he may have expressed himself.

The Cases cited were many, and difficult to reconcile. Each Side had a String of them.

THIS CASE was first argued on *Tuesday* the 7th of *February* 1769, by Mr. *Walker* for the Defendant, and Mr. *Serjeant Glynn* for the Plaintiff; and again, on *Tuesday* the 2d of *May* 1769, by Mr. *Serjeant Burland* for the Defendant, and Mr. *Dunning* (then *Solicitor-General*) for the Plaintiff: After which, it stood for the Opinion of the Court, till this Day. And now Judgment was given for the Defendant, upon the Opinions of *LORD MANSFIELD*, Mr. *Justice Aston*, and Mr. *Justice Willes*, against that of Mr. *Justice Yates*.

THE COURT not being able, after the most mature Deliberation, to concur in Opinion, The Judges delivered their Sentiments *seriatim*: And Mr. *Justice Yates* holding it to be an Estate *Tail*; and *LORD MANSFIELD* and the other two Judges holding it to be an Estate only for *Life*; there was

JUDGMENT for the DEFENDANT.

The Plaintiffs brought a Writ of Error in the Exchequer-Chamber: And it was several Times argued there. The last Argument was the 8th of *May* 1771.

On the 29th of *January* 1772, THE JUDGES who composed that Court gave their Opinions *seriatim*. Sir *Thomas Parker* (then Lord Chief Baron) Mr. *Baron Adams*, Mr. *Justice Gould*, Mr. *Baron Perrott*, Mr. *Justice Blackstone*, and Mr. *Justice Nares*, were of Opinion for the Plaintiffs. Mr. *Justice Blackstone*, (who made a very able and elaborate Argument) agreed with the Majority of the Court of King's Bench, "that if the Intent of the Testator manifestly and certainly appeared, (by plain Expression, or necessary Implication from other Parts of the Will) that the Heirs of the Body of *A.* should take by Purchase, and not by Descent, then a Devise to *A.* for Life, and after his Decease to the Heirs of his Body, not only might but must be construed an Estate in strict Settlement:" But he thought, it did not manifestly and certainly appear, from the mere intended Restraint of the Power of Alienation in *A.*, that the Testator had meant that the Heirs of *A.*'s Body should take by Purchase, and not by Descent; or even that he knew the Difference between the two Methods of taking. The Lord Chief Justice of the Common Pleas (*Sir William De Grey*) and the present Lord Chief Baron, were for affirming the Judgment of the Court of King's Bench. The Lord Chief Justice of the Common Pleas, spoke last; and, to the great Satisfaction and Edification of those who heard him, explained the Principles, went through all the Cases, and took Notice of every Thing which had been said at the Bar, or by any of the Judges from whom he differed: And whoever shall have the Opportunity

Opportunity of seeing his Argument, will see the Subject exhausted in a most masterly Manner. I speak from what was the general Voice and Sense of *Westminster-hall*: But I did not hear, and therefore cannot report it.

THE DEFENDANT brought a Writ of Error to Parliament: Which is still depending.

For that Reason, and because I did not hear the Opinions given in the Exchequer Chamber, I do not now report those given in the Court of King's Bench. As the Case at present stands, it will not settle the general Question "Whether a "Testator's manifest Intent may control the legal Operation "of the Word HEIRS, as a Limitation." If the Writ of Error should proceed to a Hearing, it may be settled; and the whole Argument may then be fully stated: But I might have been thought too tedious, if, in its present State, I had gone into a long and voluminous Disquisition of the cited Cases. It is sufficient, at present, to say, that one Side replied upon the abovementioned Rule, and adjudged Cases which have made the Testator's Intention give Way to it; And the other Side relied upon plain Principles in the Construction of Wills, and adjudged Cases which, from the manifest Intent of a Testator, have, after an Estate for Life to the Ancestor, turned a Limitation to his Heirs into the Description of a Purchaser.

The Judges of the King's Bench were above Five Hours in delivering their Opinions. A particular Report of them must have run into a vast Length; and have been still imperfect, without adding those delivered in the Exchequer-Chamber, which I did not hear, and was incapable of reporting. If the Arguments of Lord Chief Justice DE GREY and Mr. Justice BLACKSTONE shall ever be made public; and if Judgment shall hereafter be given by the House of Lords; it may then be Time enough to attempt a complete Report of the whole Case: At present, I have thought it better to defer it.

* I do not reckon the Case of the this Volume, * there never has been, from the 6th of No-King and nemher 1756, to the Time of the present Publication, a final Difference of Opinion in the Court in any Case or upon Reversal of any Point whatsoever. It is remarkable too, that excepting any Opinion these two Cases, no Judgment given during the same Period of the Court; because the has been reversed, either in the Exchequer-Chamber or in Parliament: And even these Reversals were with great Diversity of Opinion among the Judges.

Flaw of be- against the Peace of the late King was not discovered till after Judgment given and entered.

I will

I will endeavour, if Life and Health shall permit, to continue these Publications up to the present Time: There are many interesting Cases still remaining unpublished. But, for Fear of tiring the Profession, I propose to shorten the argumentative Part, as much as possible.

I am very sensible that I have not done Justice to the Matter, or perhaps the Language, either of the Court or the Bar: But I flatter myself that I have with tolerable accuracy stated the *Cases* and also the *Points* upon which the Judgment turned.

The favourable Reception of the Work, and the increasing Demand, I do not impute to any Merit of mine, but to the great Estimation in which the COURT stands.

We who have seen some of the best of *former* Times, can not help observing the Preference due to *these*; and are equally surprized at the Multiplicity of Business now brought before the Court, and the Ability and Celerity with which it is dispatched, with universal Satisfaction.

I am informed, that at the Sittings for *London* and *Middlesex* only, there are not so few as Eight Hundred Causes set down a Year; and all disposed of: And though many of them, especially in *London*, are of considerable Value, there are not more, upon an Average, than between Twenty and Thirty ever heard of afterwards, in the Shape of special Verdicts, special Cases, Motions for new Trials, or in Arrest of Judgment: Of a Bill of Exceptions, there has been no Instance. (I don't include Judgments upon criminal Prosecutions: They are necessary Consequences of the Conviction) My Reports give but a very faint Idea of the Extent of the whole Business which comes before the Court. I only report what I think may be of Use, as a Determination or Illustration of some Matter of *Law*. I take no Notice of the numerous Questions of *Fact* which are heard upon Affidavits; (the most tedious and irksome Part of the whole Business) I take no Notice of a Variety of Controversies, which, after having been fully discussed are decided without Difficulty or Doubt. I take no Notice of many Cases which turn upon a Construction so peculiar and particular as not to be likely to form a Precedent for any other Case. And yet, notwithstanding this Immensity of Business, it is notorious, that in Consequence of Method and a few Rules which have been laid down to prevent Delay, (even where the Parties themselves would willingly Consent to it) nothing now hangs in Court. Upon the last Day of the very last Term, if we exclude such Motions of the Term as by the Desire of the Parties went over of Course, as Peremptories, there was not a single

Matter

Matter of any Kind that remained undetermined, excepting one Case relating to the Proprietary Lordship of *Maryland*, which was professedly postponed on Account of the present Situation of *America*.

One might speak to the same Effect, concerning the last Day of *any* former Term, for some Years backward.

I hope, that, in future, some other Persons, of more Ability than myself, (I will not compliment him with greater Fidelity) will supply my Place. It would be great Pity to leave the Decisions of a Court so filled, to the ignorant erroneous and false Reports of News-papers, monthly Historians, and Collectors for Book-sellers: or, (what is perhaps still worse) to the posthumous Publication of defective and imperfect Notes of Gentlemen who cursorily took them, merely for their own Use and as Helps to their own Memoris, without any thoughts of making them public.

I have the Pleasure of thinking that if my Reports have no other Merit, they have at least anticipated, and may possibly tend to prevent such kind of Publications. And for this Reason, I wish to proceed in communicating to the Public the Materials which I have collected, subsequent to the present Publication, and up to the present Time.

Inner Temple, 20th May 1776.

The End of HILARY TERM 1770. 10 G. 3.

and of the FOURTH VOLUME.



A

T A B L E
O F T H E
P R I N C I P A L M A T T E R S

Contained in *this Volume.*

Action

FOR a malicious Prosecution—must be grounded on *two* Essentials; *wiz.* Malice (express or implied); and Want of probable Cause. 1974.

On the Case, for Money had and received for the Plaintiff's Use, ought to be brought against the Principal; not against a Receiver or Collector. The Right can't properly be tried in the latter. 1985, 1986.

For Criminal Conversation with Plaintiff's Wife—

1st. Evidence must be given of a Marriage in Fact. 2059.
2dly. Cohabitation, Reputation, or other Circumstances from which it may be inferred only, do not amount to Evidence of an Actual Marriage. *ibid.*

For Money had and received to Plaintiff's Use—The Plaintiff can recover no more than what he is in Conscience and Equity intitled to. 2134. v. *supra*, under pa. 1010, 1011, 1012.

By a Reversioner, will lie, for an Injury done to the Value of the Inheritance. 2141.

For Slander of Title. 2422 to 2426. See Slander of Title. Of Debt upon a Judgment will not lie, after the Defendant has been taken in Execution on a Ca. Sa. and discharged by Consent of the Plaintiff. 2483. See Pleading.

Affidavit

A T A B L E of the Principal Matters.

Affidavit

Of the Truth of the Suggestion for a *Prohibition*. 2035, and
2037 to 2041. See *Prohibition*.

To hold to *special Bail*. 1992 to 1997. See *Bail*.

Where necessary, to ground a *Prohibition*. 2032, 2039, 2040.
See *Prohibition*.

Ambassador.

Domestic Servant privileged by 7 *Ann. c. 12.*

1st. Must shew that he was in the Service at the Time
when arrested. 2017.

2dly. This Act is agreeable to the *Law of Nations* ;
which is Part of the Law of *England*. 2016. V.
supra, 1480, 1481.

3dly. The Registering the Name &c. under the 5th Sec-
tion, is not a Condition precedent to being intitled
to the Privilege : It relates only to proceeding against
the Person arresting. 2017.

Amendment

Here in *England*, of a *Judgment in Ireland*. 2156, 2157.

In *Ejectment*—The Declaration was amended, by altering the
Time of the Demise ; where the Plaintiff would have been
barred by a Fine, from bringing a new *Ejectment*. 2448,
2449. v. *supra*, 1166.

Of an *Information for a Misdemeanour*, by striking out the
Word “*Purport*” and inserting the Word “*Tenour*,” made
by a *Judge at Chambers*, the Day before the Trial, upon
hearing both Sides but *without Consent* on the Part of the
Defendant, was holden to be allowable and regular. 2527
to 2533. See *Information*.

Apprenticeship

John Roe went to live with *John Steward* a Freeman of Col-
chester, at or before *Michaelmas* 1731, upon *Liking*, in
order to his being bound Apprentice ; and continued to
live with and serve his Master in *that Manner*, till the 24th
of *July* 1732 ; WHEN he was bound Apprentice to him
by *Indenture*, for Seven Years, to commence from the said
Michaelmas 1731. He continued to live with and serve
him under the said *Indenture*, from the said 24th of *July*
1732

A T A B L E of the Principal Matters.

1732 until within about a Year and a Half of the End of the Term of Seven Years; when an Indorsement was made on the Indenture, whereby his Master let him to a Non-Freeman, for the Residue of his Time; with whom he lived and served, the Remainder of the said Term.

Qu. Whether this Binding and Service are sufficient to intitle the Apprentice to be admitted and sworn a Free Burges, under a C U S T O M " That every Person who had served " an Apprenticeship, by Indenture, for the Term of Se- " ven Years, to any Freeman, had a Right to be admit- " ted and sworn a Freeman, or sworn Burges &c." 2287.

A Journeyman is not liable to the Penalty of 5 Eliz. c. 4. § 31. for not having served an Apprenticeship. 2449, 2450. v. supra, (1st and 2d Articles,) and Title Trade and Trader.

Artificers.

Seducing them abroad. 2026. See Sentence, Statutes.

Whose Living is substantially gotten by Mechanical Labour, with a Mixture of buying and selling, are, upon the Authority of Cases, liable to Commission of Bankruptcy; Though the Court were sensible of the Inconvenience of holding them so. 2148.

Attachment.

The Defendant can't come in and acknowledge the Contempt, and submit to Punishment, before or without answering Interrogatories. Unless it be in the Place of a Rescue returned. 2129, 2130.

Attorney

Has Privilege to keep the Venue in MIDDLESEX, when Plaintiff; but not to CHANGE it thither, when he is Defendant. 2027 to 2032. See Venue.

Neglecting to charge the Defendant being in Custody, with a Declaration, within two Terms; by which Omission, the Defendant obtained his Discharge; is liable to an Action by the Plaintiff; and (500l. Damages have been actually given by a Jury, in such an Action.) But the Court will not proceed against him for it, in a summary Way: It ought to be left to a Jury, as to the Quantum of the Damages. 2060 to 2063.

Knowing a Case to be out of the Jurisdiction, or exceeding the Bounds of his Duty, may be answerable as a Trespasser. 2109.

Privilege is the Privilege of the Court he belongs to: Not his own, personally. (This was in C. B.) 2113 to 2116.

Privilege

A T A B L E of the Principal Matters.

Privilege continues no longer than he remains an acting Attorney of his Court. *ibidem.*

Privilege exempts him from serving Sheriff of his Corporation; though he was resident in the Corporation before and when he was admitted an Attorney of C. B. *ibid.*

Authors.

Have not by the *Common-Law*, the sole and exclusive Copy-Right remaining in themselves or their Assigns, in Perpetuity, after having printed and published their Compositions. 2409.

But by the Statute of 8 Ann. c. 19. it is secured to them for Fourteen Years from the Day of publishing: And after the End of Fourteen Years, the sole Right of printing or disposing of Copies shall return to the Authors, if then living, for other Fourteen Years. *ibid.*

Bail.

Common : Special—The Plaintiff's *Assignee* under a Commission of *Bankruptcy*, swear to the Debt, “as appears to them by the last Examination of the Bankrupts, and as these Deponents verily believe;” And that they have not received the Debt or any Part of it, but believe it to be still due. The Bankrupts had given in an Account of this Debt upon their Examination; to the Truth of which they had sworn, to the best of their Remembrance and Belief: But they refused to swear it in an Affidavit to hold the Defendant (their Father in Law) to Bail. The Court held him to Bail. 1992 to 1996. v. *Supra*, 655. 1032. 1447. 1687. and *infra*, 2126. 2280.

In a Civil Action for a Person convicted of *Felony*, are too late to have a *Certiorari* to bring up the Principal to be surrendered in their own Discharge, after he is actually on Board for Transportation. 2034.

Excepted to, but not struck off the *Bail-piece*, may, if afterwards attacked, apply for an *Exoneratur*; which shall be entered *nunc pro tunc*, . 2107.

Common : Special. In an Action of *Debt* upon a *Judgment*, where the Original Cause of Action was under 10l. but (by the Addition of Costs) the *Judgment exceeds* 10l. The Common Pleas require *Special Bail*: This Court, only *Common*. 2117, 2118.

Common : Special. Affirmation “that the Defendant was justly and truly indebted to the Plaintiff in 5000l. for so much Money had and received of the Affirmand: “For which, he has not accounted.” These last Words render it not positive. He was discharged on filing *Common Bail*. 2126, 2127.

Have

A T A B L E of the Principal Matters.

Have Time to *surrender their Principal*, till the *Quarto die post* (provided it be done *sedente Curia*) where the Action is by *ORIGINAL*. 2134.

Lord B. charged positively with a *Rape*, and Two Women accessory before the Fact, were admitted to Bail, by Four Manucaptors: His Lordship 4000l. and 4000l. The Women, in 400l. and 400l. each. 2179.

Common : Special. Swearing to *Belief*, and as certainly as the Nature of the Thing will bear, is sufficient, where the Plaintiff is an *Executor*, or *Administrator*, or *Affignee* under a Commission of Bankruptcy. 2283. v. *supra*, 1992, &c.

In *Error*, upon a Judgment in *Ejectment*—justify in *double the Rent*. 2502. See *Error*.

After Bail had *justified*, Plaintiff (without disclosing this) obtained a Side Bar Rule “to discontinue on Payment of ‘Costs;’” and brought a *new Action*. The Court discharged the Side-Bar Rule. 2502, 2503.

Landed Property in JAMAICA does not qualify to justify as sufficient Bail; because not liable to the *Process* of this Court. 2526, 2527.

Or Security to be taken by the *Sheriff*, on a *Capias utlagatum*, pursuant to 4, 5 W. & M. c. 18. 2537 to 2542. See *Outlawry, Statutes*.

A Person in Custody upon a *Capias utlagatum* after *Conviction* of a Criminal Misdemeanour can not be admitted to Bail, without *Consent* of the Prosecutor. *ibid.* For he is in *Execution*. 2545 to 2549.

Bankupt.

An *Inn-keeper*, quatenus *Inn-keeper*, is not within the *Bankrupt Laws*. 2068.

Nor a *Victualler*, quatenus *Victualler*, *ibid.* and 2065 to 2069.

But a *Butcher* is, (as well as a Shoemaker.) 2148.*

The Court saw the Inconvenience of extending the *Bankrupt Laws* to *Artificers* whose living is substantially gotten by *mechanical Labour* with a *Mixture of buying and selling*: But they thought themselves bound by the Authority of *Cases*. *ibid.*

Ann and Isaac Scott were *Partners*, Isaac, on the 27th of March, absconded. On the 28th he sent to Rolleston, a Creditor of the Partnership, a Letter from Dover inclosing a Bill of Parcels dated the 23d of March, of Seven Bags of Cochineal, as if Rolleston had purchased them of Ann and Isaac Scott; (which was not at all true;) informing him “that he had deposited them at a public Warehouse, in ‘‘ Rolleston’s Name and for his Use;” (which he had done on the 26th, and they were so booked; but Rolleston did not

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not know it.) On the 30th *Rolleston* went to the Warehouse ; found them there ; sold them : and applied the Produce to his own use, in Part of Payment of the Debt due to him from the Partnership. This Transaction of *Isaac's* is *fraudulent*, and *void*, and shall have no Effect to intitle *Rolleston* either to the Moiety of *Isaac* or the Moiety of *Ann*. 2174 to 2177.

La Roche and *Wilting*, being possessed of a promissory Note of *Bryer* and *Everard*, payable to them or Order, for 600l. indorsed it to *Temple*, to whom they were indebted to a larger Amount ; and the same Morning (being *F iday*) sent it in a Letter to him at *Trowbridge*: Which Letter was received by him there on *Monday*, and could not be so before. *La Roche* and *Wilting* committed Acts of Bankruptcy on the intermediate *Saturday*. They had given *Bryer* and *Everard* Two Notes for 300l. each : which had not been discharged. It was stated " that the said Note " was so indorsed and sent to the said Defendant (*Temple*) " in Contemplation of their Insolvency and subsequent Fai- " lure." Judgment was given for the Plaintiffs, the Assignees, who had brought Trover against *Temple* for this Note : For, the Indorsement and sending of the Note to *Temple* was *fraudulent* upon all the other Creditors, and particularly *Bryer* and *Everard*. 2235, &c.

11. If Bills of Exchange are sent, or Goods consigned to a Person who *has paid the Value* before ; and the Sender becomes Bankrupt ; the Assignees shall not take them back, though the Person to whom they were sent did not then know of their being sent : But if the Consideration has *not been received*, The Court of Chancery always interposes. 2239.

2d. *Fraudulent Conveyances* are *Acts of Bankruptcy*. *ibid.* and 2240.

3d. All *Acts to defraud Creditors* are *void*. *ibid.*

4th. An insolvent Creditor can not go out of the Common Course of Trade and Business, to prefer a particular Creditor or Creditors. *ibid.*

5th. *Assent* is necessary to complete every Contract. 2341. Conforming to the Statutes, is *discharged* (by 5 G. 2. c. 30. § 7.) from all Debts *due or owing* at the Time of his becoming Bankrupt. But *contingent Ones*, not proveable under the Commission, are not discharged by the Certificate. 2434.

A *collateral, independent*, express Covenant by an Assignee of a Lease, " to indemnify the Assignor," is *not discharged* (with respect to subsequent Breaches,) by the Assignee's becoming Bankrupt, the Assignment of his Effects, and his obtaining a Certificate : It was *not* a Debt due or owing at the Time of his becoming Bankrupt ; and the Assignor could not prove it as such, under the Commission. *ibid.* and 2246.

A *frau-*

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A *fraudulent Sale* of Goods by the Bankrupt to *One* of his Creditors, in Concert and *Combination* to keep up the Bankrupt's sinking Credit, in order to *prefer* this One Creditor and *cheat* Others, is *void*, (though it may not be an *Act of Bankruptcy* in itself,) and does *not alter the Property* of the Goods : And Trover will lie, by the *Assignees*, for the Goods. 2477 to 2482.

Bazbers

Of London—Incorporated with the Surgeons of London, by 32 H. 8. c. 42. Separated by 18 G. 2. c. 15. Which latter Statute *only dissolves the Union*, but does not repeal the 4th and 5th Sections of the former. 2133. See *Surgeons*.

Baron and Feine

A Wife *ill used* by her Husband shall not be delivered to him, but protected against any Insult from him. 1991. See *Habeas Corpus*.

A *voluntary Pension* from the Crown, *during Pleasure*, shall not excuse the Husband from being liable to be *sued by her Creditors* by whom she was supplied with *Necessaries*. 2177, 2178.

Bigamp.

Evidence of it. A Marriage *in Fact* must be proved. 2058. 2059. See *Evidence*.

Bonds.

To *reimburse a Compounder of Differences of Stocks*, the half of what he had paid for himself and a Person *jointly concerned* with him in the Contracts compounded—is not void by 7 G. 2. c. 8. § 5. 2069 to 2072. See *Stock-jobbing*.

Bribery

At Elections to Parliament—See *Statutes* (2 G. 2. c. 24.)

At Elections to Parliament—*Evidence* to support the Declaration. 2268, 2269. See *Evidence*. And again 2275. 2276. See *Evidence*.

At Elections to Parliament—The Offender, *discovering* another so as to be convicted, and not having been before *that Time* himself convicted, shall be indemnified and discharged of all Penalties and Disabilities : 2 G. c. 24. § 8. 2286.

1st, It

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1st. It is not necessary that the original Discoverer should be the *Prosecutor*: He may be a *Witness*. *ibid.* v. *infra* 2468.

2d. "Before that Time"—Relates to the Time of *making* the original Discovery; not to the Time of giving Evidence at the *Trial*. *ibid.*

3d. A *Verdict alone* is not a *Conviction*: It must be completed by *Judgment*. But when so completed, it shall relate back to the Time of the first Discovery. *ibid.*

4th. How a Discoverer fairly intitled to his Indemnity may be relieved. *ibid.*

At Elections to Parliament. The Offender *discovering*—Where indemnified. See 2 G. 2. c. 24. § 8.

1st. If sued, he may plead "*Nil debet*," and give his Excuse in Evidence. 2469, 2470.

2dly. A *Witness* in a former Suit brought against him was held the *Discoverer*; and that the *Prosecutor* of that Suit could not be considered as the Discoverer. *ibid.* v. *supra* (under 2468. Subdivision 1st.)

No Damages for Detention of the Debt, in an Action of Debt on the 7th Section of the above Statute. 2490, 2491. See *Error*.

Offering Money to a Privy Counsellor, to procure the Reversion of an Office in the Gift of the Crown, is a Misdemeanour at Common-Law, and punishable by Information. This was an Offer of 5000l. to the Duke of *Grafton*, then first Lord of the Treasury, to procure the Reversion of the Office of Clerk of the Supreme Court of the Island of *Jamaica*: Which Office is granted under the Great Seal, and consequently must be governed by the Laws of *England*; and was not in the Duke's particular Department. The *Attempt* to induce him to advise the King, under the Influence of a Bribe, is *criminal*; though never carried into Execution. 2499, 2500.

At Elections to Parliament—The Act of 2 G. 2. c. 24. does not make the Plaintiff in the Action the *Discoverer*; nor consider him as the *Discoverer*, conclusively: It is not to be presumed that he was so, without any Evidence of it. Yet the Court will not say "That the Plaintiff in the Action cannot be the Discoverer." 2504, 2505. v. *supra* (under 2286, and 2469.)

Broker.

A Person who, for Brokerage and Hire, negotiates and concludes Bargains for Stocks, is a Broker within 6 Ann. c. 16. § 5. 2104.

Buildings.

Party-Walls. 2298. See *Statutes* (11 G. 1. c. 28.)

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By-Law.

A By-Law "that no Stranger nor Foreigner shall use the
" Craft of a Taylor within the City of Bath, except he be
" first made free of the said City;" founded on a Custom
" that no Stranger Person hath of Right used or of Right
" ought to use the Craft of a Taylor within the City
" aforesaid, except he be free of the said City;" is a good
" By-Law. 1952.

Of the College of Physicians. 2186 to 2203. See Physicians.
And v. *supra*, under pa. 1833.

A Corporation by Charter can't make By-Laws inconsistent
with the Intention, or counteracting the Directions of their
Charter. 2207, 2208.

In the abovementioned Case (1827 to 1840 of the Third Vol.)
the Common Council of Maidstone made a new By-Law
confining the Election of Common Council Men to the
Sixty Seniors of the Common Freemen (about 900 in all,)
exclusive of the Rest. It was holden bad, and contrary to
the Intent of their Charter. *Ibidem*.

" That any Person or Persons (not being intitled to Freedom
" by Birth or Servitude) should be thereafter admitted to
" it, upon Payment of the Price or Sum of Ten Pounds,
" &c. with the usual and accustomed Fees"—is a bad
By-Law. 2260 to 2267.

Charter gives the Power of making By-Laws, to the Mayor
and Aldermen; and the Right of Election of Freemen and
Burgeses to the Mayor Aldermen and Commonalty. The
Mayor and Aldermen with the Assent of the Commonalty,
make a By-Law to exclude the Commonalty. 2515 to 2521.

1st. It was objected, "that the Corporation has no Power
to exclude an integral Part of the Body, when the
Charter has given them the Right of electing. *ibid.*
v. *supra*. 1833.

2dly. This By-Law, MADE by the Mayor and Aldermen
alone, though assented to by the Commonalty, can't
take away their Right of electing. 2521.

Capiac ad Satisfaciendum.

After the Defendant has been taken in Execution on a Ca.
Sa. and discharged by the Consent of the Plaintiff, an Ac-
tion of Debt upon the Old Judgment will not lie against
him. 2483. See Pleading.

Carrier.

A Bailee is only obliged to keep the Thing delivered to his
Care, as he would keep his own: But a Common Carrier,
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in respect of the Premium, must make good the Loss, though not in Fault, or even if robbed. 2298 to 2302. But the Reward ought to bear Proportion to the Risque. *ibid.* He ought therefore to have more for carrying Money or Jewels, than for common ordinary Goods. *ibid.* If Money or Jewels are sent by him, denying or concealing that it is Money or Jewels, he is not answerable for the Loss of them. *ibid.* A Common Carrier may accept specially. *ibid.* He may refuse to contract, in extraordinary Cases, without extraordinary Terms. 2302. He shall be answerable for no more than he is told of; nor for what is concealed from him, and he is deceived: For, *ex dolo malo non oritur Actio.* 2301, 2302.

Cases doubted or denied.

Penfold, Mariner, and Five Others, in Sir T. Jones, 197, 198. and 2 Salk. 589. Anonymous. See Rescue. 2130. Sir Baptist Hicks against Goats, denied as reported in 2 Ro. Abr. 703. Title "Trial," pl. 9. but confirmed as reported in Cro. Jac. 390. 2229, 2230, 2231. Kenrig v. Eggleston, Aleyne 93. { 2299 to 2302. See The cited Cases in Ventris 238. Tichburne v. White, 1 Strange 145. } Crier.

Certiorari,

To bring up a Principal to be surrendered in Discharge of his Bail, shall not be granted, where such Principal is a Felon under Sentence of Transportation, and actually on board a Transport. 2034.

Brought by a Defendant, to remove an Indictment; and a Recognizance entered into, pursuant to 5, 6 W. & M. c. 11. § 2 & 3. and the Defendant convicted and fined; and the Prosecutor has received the one third of the Fine; and then applies for his Costs under the Recognizance: He shall not have Both; but so much shall be deducted, as he has received for the one-third of the Fine. 2126. See Costs. Lies on 8 Ann. c. 25. a private Act, about bringing fresh Water into Liverpool. 2244. And the Proceedings were quashed, because the Foundation of this inferior Jurisdiction was not set out. *ibid.*

Lies to a Welch Quarter Session of the Peace, to remove an Indictment up into the King's Bench, (passing over the Grand Sessions.) 2457 to 460.

The King has a Right to demand a Certiorari, where the Crown is interested or concerned. *ibid.*

But

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But to a *Common Prosecutor* (where the Crown is not concerned, but the *King's Name* only used as of Course,) it may be either granted or refused, at the *Discretion* of the Court. *ibid.*

A *Defendant* can never demand One: He must lay sufficient *Grounds*, to obtain either a *Certiorari* or a *Procedendo*. *ibid.* *Superseded, quia improvidè emanavit*; the Return taken off the File; and Orders remanded; The *Certiorari* being taken away by 32 H. 2. c. 54. (a Road Act.) 2522.

Commitment

By two Justices of Peace, on the *Information and Request* of an *Ecclesiastical Judge*, to have their *Affiance and Aid*, in a Cause for *Subtraction of Tithes*, pursuant to 27 H. 8. c. 20. § 1. The proper Form and Regularity of the *Certificate* and *Commitment* were fully discussed; and particularly, whether such Request could be made before Sentence. 2095 to 2100. See *Statutes, Tithes*.

Common Carrier. See *Carrier*.

Common : Commoner.

For an *Overcharge*, the Commoner had anciently two *Remedies*, *viz.* an *Affize*, if surcharged by the *Lord*; a *Writ of Admeasurement*, if surcharged by a *Fellow Commoner*: An *Action on the Case* also may be maintained against Either. But he can not *distain*, wherever there is *COLOUR of Right*: Though he may *distain* the *Cattle* of a *Stranger*, or even of the *Lord*, if he be *totally excluded* by a *Custom*. He can not *distain* a *Fellow-Commoner's Cattle*, as surcharged; where the Number allowed depends upon the *Number of Acres*, or requires a *Medium* to determine the proper Proportion, or depends upon a *collateral Fact*, or upon *Matter of Judgment*. 2426 to 2432.

Yet Qu. Whether a Commoner has not a Right to *distain* the *Surplus Cattle* of a *Fellow Commoner* who is stinted to a Number *absolutely certain*, and exceeds such *absolutely ascertained Number*. 2431. But where the Right of Common is for *Cattle levant and conchiant*, One Commoner can not *distain* the *Cattle* of Another, for a supposed *Overcharge*. *ibid.*

Common Recovery

Where void by 34, 35 H. 8. c. 20. the Donee being Tenant in Tail, of the *Gift of the Crown*, and the *Reversion in the Crown*. 2224. See *Statutes* (34, 35 H. 8. c. 20.)

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Condition.

A Condition may, in some Cases, be construed a *Limitation*.
1941 to 1944. See *Limitation, Devise*.

Condition Precedent,

In Restraint of Marriage—Ought to be construed with the utmost Rigour and Strictness, in Favour of Devisees attempted to be so restrained. 205 to 2057.

Contempt—See Attachment, Practice.

Contracts.

Executory Contracts for Goods are not within 29 C. 2. c. 3. § 17. 2101, 2102.

Conveyance.

The Whole of a Conveyance shall be taken together : And the several Parts of it shall relate back to the principal Part.

Convict,

Actually on board a Transport, shall not be brought up by Certiorari, to be surrendered by his Bail in a Civil Action.
2034.

Convictions.

Upon Convictions, it is necessary to set out the Evidence ; that the Court may judge whether the Justices have done right, or not. 2063, 2064.

Summary Convictions ought to be kept to a proper Degree of Strictness. 2281. v. *supra*, 153, 154 and 682. of Vol. 1 & 2. On 5 G. 3. c. 14. § 3. “for the more effectual Preservation of Fish, in Fishponds and other Waters.

1st. If it be not necessary that the Complaint to the Justice must be made by the Owner. 2281.

2dly. It is, at least necessary that it should appear “that the Fishing was without Consent of the Owner.”
2282.

Copphold.

Blackwell North, a Copyholder in Fee, surrendered (out of Court) in 1724, to the Uses of his Marriage Settlement, with

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with Reversion to himself in Fee. In 1725, he surrendered to the Uses of his Will. In 1743, he made his Will. In 1751, the Surrender of 1724 was presented; and he was admitted according to the Tenor of it. Adjudged "That his Admission in 1751 was no Revocation of his Will made in 1743." For

1st. The Reversion in Fee remained in him, after the Surrender in 1724. 1960, 1961, 1962.

2dly. No Alteration or Change of Estate happened upon his Admission in 1751. *ibidem.*

3dly. The Admission relates back to the Time of the Surrender, and is only a Completion of it. *ibid.*

Corporation, Corporator.

After TWENTY Years unimpeached Possession of a Corporate Franchise, no Rule shall be granted, "to shew by what Right the Possessor holds it." 1962, 1963.

But UNDER Twenty Years, every Case must depend upon its own particular Circumstances. *ibid.*

In a Case of Nineteen Years and Eight Months, where the Circumstances were very strong in Favour of the Possessor, and against those who moved for the Information against him, the Court discharged the Rule with Costs. *ibid.*

Recorder—His Duty and Office. 1999 to 2008. See Recorder.

In Election merely colourable—is as no Election and clearly void within 11 G. 1. c. 4. 2008 to 2011. See Statutes, Mandamus.

A Corporate Officer elected under a Mandamus pursuant to 11 G. 1. c. 4. § 4. must be sworn in before the Officer PRESIDING at such Election. 2132.

A new Trial was granted; the Question having never been fully before the Jury. 2139, 2140.

1st. Question—Whether the Presence of a Mayor de Facto (not a mere Usurper,) is sufficient to authenticate an Election. *ibid.*

2dly. Whether, in a Derivative Title, Possession under Colour of a Title, is not sufficient, without a strict Title de Jure. *ibid.*

3dly. Whether a Swearing before Three Persons as Aldermen, and so set forth, will let the Defendant in to give Evidence of a Swearing before the presiding Officer; which One of the Three in Fact was. *ibid.*

No Person can be obliged to be a Member of a Corporation, without his Consent. 2199 to 2201.

By-Charter—can't make By-Laws inconsistent with the Directions or counteracting the Intention of their Charter. 2208. See By-Law.

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Charter directs *Two* Bailiffs—If the Corporation *choose only One*; or One be *ousted* by a Judgment of *Ouster*; the *One alone* can not act. 2243.

Have such an Interest in the *Mayor's Title* to his Office, that he shall not be permitted to *give it up*, when those whose Rights depend upon it are desirous to maintain it, *without any Expence to him*. 2279.

The *Point of Limitation* fixed in the *Winchelsea Causes* “ of “ not granting Informations in Nature of *Quo Warranto*, “ after Twenty Years quiet Possession.” (v. *Supra*, under pa. 1962, 1963.) was *strictly adhered to*. 2524, 2525.

Costs.

By an *Executor* or *Administrator*, upon *discontinuing*—

1st. He shall *pay Costs*, where it is his *own Fault*, or *Laches*: But

2d. He shall have Leave to *discontinue without paying Costs*, if it be a *fair Transaction*. 1928, 1929. v. *Supra*, 1585.

On discharging a Rule to shew Cause why an Information in Nature of *Quo Warranto* should not be granted; the Application being groundless and unreasonable. 1965. See *Information in Nature of Quo Warranto*; also *Corporation, Corporator*.

On a *Remand*. 1987 to 1990. See *Remand*.

Security for answering them, shall not be required of a *Plaintiff* gone abroad, and having no Effects in *England*. 2105. v. *Supra* (under pa. 1026.)

Rule to shew Cause why they should not be paid to the Prosecutor, *out of the Money levied* upon a forfeited Recognizance. 2119. See *Practice, Recognizance*.

Upon a *Recognizance* entered into on the Defendant's removing an Indictment by *Certiorari*, pursuant to 5, 6 *W. 3. c. 11. § 2. 3.* (made perpetual by 8, 9 *W. 3. c. 33.*) are to be taxed upon *Conviction*, &c. But if the Defendant has been *fined*, and the Prosecutor has received the one-third of the Fine; so much shall be deducted out of the Sum allowed him for Costs. 2126.

On a *Reference* which takes *no Effect*. See *Practice, Remand*.

Covenant.

An *express collateral Covenant* “ to indemnify,” shall bind a *Bankrupt*. 2446. See *Bankrupt*.

Damages.

The *Quantum of Damages*, in an Action of *Covenant*, may be ascertained by the Jury, where the precise Sum is not the *Essence*

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Essence of the Agreement: But where the *precise Sum* is ascertained fixed and agreed upon between the contending Parties, *that very Sum* so fixed upon by the Agreement of the Parties is the *Measure* of the Damages; and the Jury can't give less. 2126 to 2236.

Debtors

Insolvent. 2120. 2127. See *Prisoners, Statutes*.

Declaration

Against a *Defendant in Custody*—omitted to be delivered before the End of the second Term: The Attorney for the Plaintiff is liable to an Action for his Neglect; but not to a summary Proceeding. 2060 to 2062. See *Attorney, Practice, Statutes*, (4, 5 W & M. c. 21.) and *ante*, pa. 1788.

By the By. Where the Proceeding is by *Bill*, If a Defendant is in *Court*, either by being in *actual Custody* of the Marshal, or by a *voluntary Appearance* at any Plaintiff's Suit, *any OTHER Plaintiff* is at Liberty to deliver a Declaration by the By, against him, *within the same Term* wherein the Writ was returnable. 2181.

Varying from the Process. 2417. See *Variance*.

In *Trespass*—for taking *Goods*—The Particulars must be specified. 2456.

Deed—

Where the *Production* of it, in Evidence, is necessary. 2484 to 2489.

Devise

To the Testator's Sister *Dorcas Wykes*, for Life; and after her Decease, to his Nephew *Ambrose Saunders* and the *Heirs Male of his Body* and the *Heirs Male of their Bodies*; and for want of such Issue, to the *Heirs Male of the Body of his Sister Dorcas Wykes* and the *Heirs Male of their Body*; Remainder to *Ambrose Corrie* and the *Heirs Male of his Body* and the *Heirs Male of their Body*; Remainder to the *Heirs of the Body* of his Nephew *Ambrose Saunders*; Remainder to the *Heirs of the Body* of his Sister *Dorcas Wykes*; Remainder to his Kinsman *Robert Ekins*, in Tail Male; Remainder to his own right Heirs: " *PROVIDED*, " and this Devise is expressly upon this *Condition*, That " whenever it shall happen that the said Estates shall descend or come unto *any* of the Persons herein before named, the Person or Persons to whom the same, from " Time

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" Time to Time, shall descend or come, do or shall THEN
" change their Sirname, and take upon them and their
" Heirs the Sirname of WYKES only, and not otherwise." In this Proviso, there is no Devise over. But in a Proviso which immediately follows, prohibiting Waste, without Consent of the Person to whom the Premisses shall next come, there is a Devise over " to the Person next intitled expectant upon the Death of the Waster," of the Part wasted; And so toties quoties, on every Waste by the Person in Possession, without Consent of the next Expectant. The Testator died in May 1742. His THEN Coheirs were his Sister Dorcas Wykes, and the said Ambrose Saunders, the only Son of Sarah Saunders, his other Sister, then deceased. Dorcas Wykes entered in January 1747, and enjoyed till December 1756; when she died without Issue. Ambrose Saunders, then the Testator's SOLE Heir at law, entered, and enjoyed till October 1765; and then died, without Issue; having NEVER changed his Sirname nor taken the Name of Wykes: But he had, in 1759, suffered a Common Recovery, to the Use of himself in Fee. In January 1766, Ambrose Corrie entered, for Breach of the Proviso by Ambrose Saunders, in not having changed his Sirname and taken the Name of Wykes. Adjudged unanimously, " that Corrie, the Remainder-Man, had no Title to enter." 1929 to 1944.

1st. This Proviso is not a Condition precedent; nor is it a Conditional Limitation. 1941, 1942, 1943.

2d. In some Cases, a Condition may operate as a Limitation: As, where there is a Devise over; or, where an Estate in Fee is given to an Heir at Law upon Condition, and it would descend upon himself, on his own Breach of the Condition. *ibid.*

3d. In the latter Case, a Conditional Limitation would be implied; although there were no Devise over. *ibid.*

4th. But after an Estate Tail, and no Devise over, a Limitation can not be implied. *ibid.*

5th. A Conditional Limitation can't be implied, unless necessary to effectuate the Intention of the Testator. *ibid.* In the present Case, such an Implication would be contrary to it: For, the Testator could not meant " that the whole Estate Tail should cease." *ibid.*

6th. And a Limitation " that an Estate Tail shall cease in Part and not in the Whole," would be void in Law. 1941.

7th. This Recovery was well suffered by Ambrose Saunders, the Tenant in Tail. It was suffered before any Advantage was taken of the Breach of the Condition. *ibid.*

8th. And One of the Judges inclined to think that he had his whole Life for taking the Name. 1943.

To

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To Trustees, upon Trust for the Testator's only Son, for Life, then to the Use of such Woman as should be his Son's Wife at his Son's Death, for her Life; then, of the Issue of his Son's Body, in Tail; then, of the Testator's own Two Daughters, in Fee: " PROVIDED always, and " it was his *very Will, true Intent, and express Meaning,* " that in Case his said Son should MARRY with any " Woman not having a competent Marriage-Portion, OR, " without the Consent and Approbation of the said Trustees " Their Heirs or Assigns, in Writing under their Hands " and Seals, to be executed in the Presence of Two or " more credible Witnesses, first had and obtained; then " his said Trustees and their Heirs and Assigns, immediately after the Death of his said Son, should stand and " be feized to and for the Use and Behoof of his (the Testator's) said Two Daughters and their Heirs for ever; " any Trust, Use, &c &c, notwithstanding." " And his " Will, true Intent and Meaning was, and he did declare, that the said Proviso or Condition therein before " expressly mentioned was NOT intended by him, nor to be " construed or taken to be IN TERROREM; but a CONDITION, for Want of Performance whereof in every " respect, the said Lands &c should in no Case be vested " in such Wife of his said Son, nor the Heirs of that " Marriage; but, on the contrary, that his said Trustees " and their Heirs should stand seized of the Premises to " the only Use and Behoof of his said Two Daughters and " their Heirs, in manner aforesaid."

The Court unanimously held—

1st. That all Clauses and Conditions in Wills, in Restraints of Marriage, ought to be construed with the utmost Rigour and Stringency, against such Restraint, and in Favour of the Person attempted to be restrained.
2055 to 2057.

2dly. That this Testator meant, " that his Son's complying with either Part of the Alternative should be a Performance of the Condition. *ibidem.*

3dly. That the Son did not incur a Forfeiture, unless he should break both Parts of it: And consequently, that he did not do so by marrying (as the Special Verdict found that he did,) a Woman who, at the Time of her Marriage with him, HAD a competent Marriage Portion; but he married her WITHOUT any Consent or Approbation of the Trustees: *ibid.*

To Coningsby Harris, for Ninety Years, if he shall so long live; and after the Determination of that Time, to the Heirs of the Body of the said Coningsby Harris; and in Default of such Issue, to S. E. for Ninety Years, if she so long lives, and to commence from the Death of the said Coningsby Harris, he dying without Issue; and, subject to

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to the Estates and Contingencies before mentioned, to *Roger Elleston*, Son of the said S. E. The Court certified "That
" it was the *clear manifest Intent* of the Testator to give
" an *Estate Tail* to such Person as should be Heir of the
" Body of *Coningesby Harris* at the Time of the *Death of*
" *the said Harris*, and the Heirs of the Body of the said
" C. H. Which Intent may take Effect as an *Executor*
" Devise; and the *Freehold*, in the mean Time, *descends*
" to the Testator's Heir at Law." And this *effectuates*
the whole Intent of the Testator. 2157 to 2162. v.
supra (under pa. 51).

" *In Default of Issue of my own Body*, I give devise and be-
" queath all that my Manor &c &c to J. A. and J. S. and
" their Heirs; upon *Trust &c &c.*" The Testator died
a *Bachelor*, and *without Issue*. The Trustees took a
FEE, determinable when the Purpose of paying the Testator's Debts Legacies and funeral Expences out of the Rents Issues and Profits of the devised Premisses, in Aid of the personal Estate, shall be performed. 2166 to 2171.

It is now settled, "that *Marriage AND a Child* is a *Revocation* of a Devise of personal Estate. But no Case has yet holden *Marriage alone* to be so." 2172.

The Reason is the same, as to Devises of Land: And it has been so holden by Parker, Smythe, Adams, Wilmot, De Grey; not so, by Perrott. *ibid.*

A Will shall be construed according to the *Intention* of the Testator, if the Words will bear such a Construction. Accordingly, an *imperfect ill worded* Will was construed to carry an *Estate Tail to all the Grandsons of the Testator (Layton)* except *William Lowndes Stone*, the Eldest; being the *manifest Intention* of the Testator. 2250. See the *Case next below this*.

The Rule laid down in *Shelley's Case*, "That when the Ancestor, by any Gift Devise or Conveyance, takes an Estate for Life, with Remainder (mediately or immediately to his Heirs, in Fee, or in Tail; the Word *Heirs* is a Word of LIMITATION; and the Estate of Inheritance shall rest in the Ancestor: and the express Limitation for Life is of no Effect;" was neither doubted nor disputed (though the Reason of it has long since ceased:) Yet the Question "Whether a Testator's MANIFEST INTENT may not controul the legal Operation of the Word *Heirs*, as a Limitation; and turn it into the Description of a Purchaser;" remains still undecided, and depending in the House of Lords in May 1766. 2579 to 2582.

Distresg.

Of Cattle surcharged upon a Common. 2426 to 2432. See *Commoner.*

East-

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East-India Company.

Officers and Soldiers in their Service are, by 27 G. 2. c. 9. subjected to Military Law and Courts Marshal. 2420, 2421.

They contract with their *common Soldiers* for a *stipulated Time*: But their Commissions to their *Officers* are *general and indefinite*. *ibid.*

A Military *Officer* in their Service has *not a Right to resign his Commission, at all Times and under any Circumstances, whenever he pleases.* 2419, 2420.

And, clearly, he is an *Object of their Military Law, as long as he remains in their Pay and Service.* 2472 to 2477.

Ejectment.

Writ of Possession has *Relation to its Teste*: Though it be *not actually sued out till after the Death of the Lessor of the Plaintiff; yet, if tested before his Death, it is regular.* 1971.

A *regular Judgment* was fairly obtained against the Casual *Ejector*; the *Tenant* having *neglected to give Notice to his Landlord*: For which Reason, the *Landlord* moved to set aside the Judgment. The *Landlord* was an *Infant*; and therefore could not *consent to any Issue.* 199⁵, 1997.

1st. The Court held that the *Possession ought not to be changed*, where there had been *no Trial nor Opportunity of trying.* *ibid.*

2dly. They thought they might add *Terms and Conditions to the Relief they granted to the Infant.* *ibid.*

3dly. That the *Tenant* ought to pay the *Costs.* *ibid.*

4thly. They accordingly *set aside* this *regular Judgment and Writ of Possession*; and ordered the *Tenant* to pay all the *Costs*: Also, that the *Lendlord* be made *Defendant*; and *not to set up any satisfied Term, or Trust-Estate*; and to admit that *Z. T.* was *seised.* *ibid.*

Can't be maintained, *contrary to the Lessor's own Covenant.* 2209. See *Lease.*

A *new Trial* may, upon proper *Grounds*, be granted in *Ejectment Causes*, as well as in others, 2224.

Amendments in Ejectment are *now carried much farther than formerly*; and may be made even in the *Time of the Demise*, to prevent being *barred.* 2448, 2449. See *Amendment.*

Where the *Production of a Deed* is necessary, to support the *Plaintiff's Title.* 2484, to 2489.

Election

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Election

To Parliament. 2270. See *Bribery, Parliament.*

Elections.

Upon a Judgment in a *Qui tam* Action on 9 Ann. c. 14. § 2. for Money won at Play and the Triple Value of it : Which Judgment was affirmed as to the Recovery of the Debt, but reversed as to the Damages and Costs. 2018 to 2022. See *Gaming v. infra*, 2490, 2491.

A Judgment in Ireland may be amended here. 2156.

If brought by a Plaintiff below, the Court (upon Reversal) may give such Judgment as the Court below should have given : If brought by the Defendant below, they can only reverse. 2156. In this latter Case, they can only reverse so much as the Defendant below complains of. 2490.

In an Action of Debt on 2 G. 2. c. 24. § 7. for Bribery at an Election to Parliament, (or in any popular Action) no Damages can be given for the Detention of the Debt. 2490, 2491. v. *supra*, 2022.

Bail in Error on a Judgment in *Ejectment* justify in Double the Rent. 2502.

Evidence

Of a Marriage in Fact—is necessary in an Action for Criminal Conversation. 2059. And in Prosecution for Bigamy. ibid.

What shall amount to Evidence of a Marriage in Fact. ibid. A Deduction may be given in Evidence, in an Action for Money had and received to Plaintiff's Use. 2134. See *Set off.* Parol Evidence ought not to be admitted, to make a Record wrong, or to defeat Justice. 2270.

In an Action for Bribery at an Election to Parliament, on 7, 8 W. 3. c. 25. the TIME of Delivering the Precept to the Returning Officer needs not to be proved : For, the Time of delivering it, though material to the Returning Officer, is immaterial to this third Person. 2276.

Where the Production of a Deed is necessary, to support the Plaintiff's Title in Ejectment. 2485 to 2489.

Production of it—shall not in criminal or penal Cases be required from the Defendant, even though he should hold it in his Hand in Court : But in civil Cases, the Court will either force the Party to produce it, (after proper Notice) though it prove against him ; or leave his Refusal to the Jury, as a strong Presumption. 2489.

Exceptions—

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Exceptions—See Bill of Exceptions.

To *General Rules*—What Exceptions are implied. 1986 to 1990. See *Remanet*.

Executor.

In *Covenant* against an Executor, the Judgment must be *de bonis Testatoris*, 2155, 2156.

Factor.

Where a *Bill of Lading* is *indorsed generally*, and the Factor *indorses* it as being his own Property, the Question turns upon its being a fair Transaction, *bona fide*, upon a valuable Consideration, and without Notice; or its being fraudulent, and a Contrivance to cheat the Principal. 2051.

Fish.

Preservation of it in Fish-Ponds and other Waters. 2279 to 2282. See *Conviction*, Statutes (5 G. 3. c. 14.)

Fishery.

In *Navigable Rivers or Arms of the Sea*—is Common and Public. It *prima facie* belongs to the Crown; and the *Presumption* is *against* any *exclusive Right*: Yet an exclusive Right may be *prescribed* for; but the *Proof lies* on the Claimer of it. 2165.

In *private Rivers, not navigable*. It belongs to the *Lords of the Soil* on each Side. 2164, 2165.

Forfeiture

Of a *public Office* concerning the Administration of Justice—*Non-Attendance* is a Cause of Forfeiture, if *wilful*: But a mere *single Instance* of Absence of a Recorder from a Session, without any aggravating Circumstance, is not so. 1999 to 2008. See *Recorder*.

Gaming.

Sir Thomas Frederick late of Westminster in the *County of Middlesex*, Baronet, was summoned (in C. B.) to answer to *Andrew Lookup*, who sued as well for himself as for the Poor of the Parish of St. Paul Covent-Garden in the County

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County of *Middlesex* aforesaid, in a Plea that he render to the *Poor* of the Parish aforesaid and to the said *Andrew &c.* The Declaration charges the Offence to have been committed “*at Westminster aforesaid.*” The Jury find Parcel of the Debt to be owing to the *Poor* of the said Parish and to the said *Andrew*; and assess his *Damages by Reason of its being detained &c.* The Judgment runs thus —“ It is considered that the said *Andrew*, who as well &c. “ and the said Poor of the Parish aforesaid, do recover &c.” “ It is also considered that the said *Andrew*, who as well, &c. do recover against the said Sir *Thomas* his *Damages* aforesaid, to &c. and also 55l. 19s. to the said *Andrew* who as well &c: at his Request, for his *Couts and Charges* aforesaid, by the Court here, for the “ Increase, adjudged.” On Error brought, Judgment was affirmed, as to the Recovery of the *Debt*; but reversed as to the *Damages and Cousts*. 2018 to 2022.

1st. Objection was, that the Parish of *St. Paul Covent-Garden* don’t appear to have any Concern in this Matter; the Offence being laid at *Westminster*. Answer, It is good, *after Verdict. ibid.*

2d. A wrong *Venue*. Answered. by 24 G. 2. c. 18. § 3. *ibid.*

3d. The Judgment is “ that the said *Andrew AND the said Poor* shall recover : ” Whereas the 9 Ann. c. 14. § 2. says “ the *Informer* shall recover.” Answer. It may be either Way. *ibid.*

4th. A common Informer can not have *Damages for the Detention* of the *Debt*, not (consequently) *Cousts* of Increase founded upon such *Damages*. Answer. The good Part of the Judgment may be affirmed; the bad, reversed. *ibid.* And it was accordingly affirmed as to the Recovery of the *Debt*; but reversed as to the *Damages and Cousts*. 2022. See *Error*.

Gleaning (or Leasing—)

The *Right or Privilege*, by Law or Custom, of doing it, must be exercised under proper *Circumstances and Restrictions.* 1926, 1927.

Great Seal

Resigned by Lord *Camden*; delivered to Mr. *Charles Yorke*; and, on his Death, to Mr. *Baron Smythe*, Mr. *Justice Baturst*, and Mr. *Justice Aston.* 2506.

Habeas

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Habeas Corpus.

Sued out by a *Husband*, against his *Wife's Friends*, to obtain his *Wife*. It appeared, that he had used her ill; and she *swore the Peace* against him. The Court would not deliver her to him; but left her at her own Liberty, and even ordered a Tipstaff to protect her. 1991.

High-Way.

Indictments for not repairing High-Ways have formerly been taken strictly: But, of late, with greater Latitude. 2093. Statutes relating to public High-Ways—Timber Carriages (and Stone) laden with only One *single Piece*, are excepted out of them; though not out of Turnpike Road Acts. 2260. See *Statutes*.

The Statute reducing into One, the several former made for amending and preserving them (7 G. 3. c. 42.) directs (in Sect. i.) Annual Lists to be made in every September, at a Parochial Assembly. Qu. Who are the *essential Constituents* of that *Assembly*; so that their *Absence* would invalidate the Acts of the Assembly? 2454. See *Statutes* (7 G. 3. c. 42. § 1.)

The Repair of them lies, of Common Right, upon the whole Parish: But if a Parish lies in Two distinct Counties, an Indictment may be brought against that Part of the Parish in which the ruinous Road lies. 2511, 2512.

Horse-Matches—

For less than the Value of Fifty Pounds, (elsewhere than at New market or Black Hambleton. (are prohibited by 13 G. 2. c. 19. § 5. 2433.

If A. and B. run a Match for 25l. each Side, this is a Match for 50l. although A. gave B. 5l. certain, beforehand, to run it. *ibid.*

Hospitals—

The Governors are not rateable to the Poor Tax; nor the ordinary Servants; nor the Poor themselves; But Officers, who have distinct Apartments for themselves and Families, may be rated. None can be rated, but such Persons who may be considered as *Occupiers*. 2435 to 2442. See *Poor-Tax*.

Husbandry.

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Husbandry.

The Right of *Gleaning* (or *Leasing*) must be exercised under proper *Restrictions*. 1926, 1927. See *Gleaning*.

Indictment—

Against twelve Defendants, on 1 J. 1. c. 22. § 5. quashed; because several Defendants were joined in one Indictment. 2046.

On 1. G. 1. Stat. 2. c. 5. § 5. against a Person encouraging and abetting, by shouting and using Expressions to incite, as Principal in the second Degree. 2073 to 2086. See *Riot*.

Objections in *Arrest of Judgment*, made and over-ruled, 2084, 2085, 2086. See *Riot*.

1st. Not shewn that the Judge was of the Quorum. *ibid*.

2^{dly}. No Issue joined, upon the Record. *ibid*.

3^{dly}. Non constat by whom the Justices were assigned. *ibid*.

4^{thly}. Three were indicted: Non constat what became of two of them. *ibid*.

For not repairing an ancient and common-King's High-Way leading from the Hamlet of *R.* in the Parish of *H.* in the County of Middlesex, towards and unto *Brentford*; and charging "that a certain Part of the said King's High-Way, situate in the Parish of *H.* aforesaid in the said County of Middlesex, leading from *R.* Place-House in the said Hamlet of *R.* to *Stroud Gate* in the same Hamlet, in the said Parish of *H.* containing &c. was out of repair, &c. &c." 2090, 2091, 2092.

1st. Leading from a Hamlet, is a sufficient Description of its Beginning. 2092.

2^{dly}. There is no Inconsistency between the first Description, and the Description of the Part out of Repair; though *R.* Place-House and *Stroud-Gate* are both described as in the Hamlet, but the High-Way is (in the Beginning of the Indictment) described as leading from the Hamlet. *ibid*.

For *Nuisances*—are not quashed on Motion: They must be demurred to. 2116.

For not repairing a High-Way—may be brought against such PART of a Parish as lies in such a County; in Case the whole Parish happens to lie within two distinct Counties. 2507 to 2512. See *High-Ways*.

Information.

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Information.

The Court will not grant an Information for a Misdemeanour upon a Motion made by the Attorney-General on Behalf of the Crown ; because, if the Attorney-General thinks that it ought to be granted, he may grant it himself. 2090. *v supra* under pa. 1565.) See Practice.

Granted against a Parish Officer (Overseer,) for procuring a Pauper-Man of another Parish to marry a Pauper-Woman of his own Parish, *with Child of a Bastard* ; in order to get the Bastard settled in that other Parish. 2106.

For attempting to bribe a Privy-Counsellor to procure a reversionary Patent of an Office grantable by the King, under the Great Seal. 2494 to 2501. See Bribery.

For a Misdemeanour—was amended, the Day before Trial, by a single Judge at Chambers, on hearing Both Sides, but without Consent on the Part of the Defendant : And this was holden to be allowable and regular. The Amendment was by striking out the Word “*Purport*,” wherever it occurred, and inserting instead of it the Word “*Tenor*.” 2529 to 2533, and 2566 to 2573.

For Misdemeanours—may be exhibited by the King’s Solicitor-General, during the Vacancy of the Office of Attorney-General. 2555, 2556. 2575 to 2577. and that, without suggesting such Vacancy.

Information in Nature of Quo Warranto—

Shall not be granted, nor even a Rule to shew Cause, after TWENTY YEARS quiet unimpeached Possession of a corporate Franchise. 1962, 1963. But within twenty Years, every Case must stand upon its own particular Circumstances : Of which, Length of Time may be one amongst others. *ibid.* And if they are very strong in Favour of the Possession, and against the Application, the Rule to shew Cause may be discharged with Costs. 1965.

The above Limitation was confirmed. The Discretion of the Court is to be guided by the Circumstances : Length of Time is one of them. 2022 to 2024. 2121. But the Length of Time (Six Years and one half) was not taken into Consideration in *Richard Wardroper’s Case* ; because his Title to the Franchise was clear. 2024, 2025.

It is contrary to the Trust reposed in the Court by 9 Ann. c. 20. (which was intended for speeding Prosecutions, and to quicken the Removal of Usurpers,) to give Leave to private Informers to make use of the King’s Name and Seal, to call the Validity of a Franchise in Question ; when such private Persons apply it under very unfavourable Circumstances. 2123, 2124.

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The previous Conduct of such private Relators; their Motives and Views; and the Consequences to the Corporation and to those who may hold Rights dependant upon the Validity of the Right attacked; may be a good Ground of refusing to grant an Information. *ibid.*

If the Defendant fails in the Title he has set up, Judgment must be for the Crown. He must shew a complete Title against the Crown, at first; and can't depart from the Title he has set up, after it has been found against him: Nor can he plead several Pleas. If any one material Issue is found for the Crown, the Crown must have Judgment: But the King has no Necessity to traverse any Thing more than the Title set up by the Defendant; nor shall the Defendant have a Repleader, after a Verdict found against him. 2145 to 2147.

But if before Trial he discovers that he has pitched upon the weaker of two Defences which he had, he shall have Liberty, upon proper Terms, to quit it and insist on the stronger; viz. to withdraw his Plea and plead *de novo*, on Payment of Costs, pleading soon, and taking short Notice of Trial, and the Prosecutor's having Liberty to reply *de novo*. 2148.

One Bailiff alone can do corporate Acts; if the Charter directs Two. 2243. See Corporation.

Can not be quashed on Motion, though both Parties consent: But the Court will discharge the Recognizance, if both Sides desire and consent to it. 2297.

Shall not be granted, after 20 Years quiet Possession. 2524.
v. supra, 1962, 1963.

The Day of making the Rule absolute for an Information, is the Period of the Limitation of the 20 Years. *ibid.*

Information, qui tam, &c.

The Informer can not compound, but by Consent of the Court: (by 18 Eliz. c. 5. § 3, 4.) 1929.

On Leave given to compound, the King's Moiety was ordered to be paid into the Hands of the Master of the Crown Office, for the Use of the Crown. *ibid.*

Ingrossing—

See 5 & 6 Edw. 6. c. 14. § 3. for the Offence; and § 4. for the Punishment of it.

Inn-keeper.

^s not (*quatenus* Inn-keeper,) within the Bankrupt-Laws.
2067 to 2069.

Interest

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Interest—

On a Writ of Error brought in the Exchequer-Chamber, upon a Judgment in this Court, and an *Affirmance of the Judgment*, and a *Scire Facias* against the Bail in Error, they used all Methods of *Delay*; so that the Interest of the Sum recovered exceeded the ordinary *Costs*: The Court ordered the Master to allow Interest from the Time of the Affirmance. 2128. v. *supra* (under pa. 1097.)

Issue—

Needs not to be joined upon the Record, upon Proceedings of *Oyer & Terminer*, or *Gaol-Delivery*. 2085, 2086.

Judges Orders—

May be appealed from, to the Court; but are *valid*, if *acquiesced in*. If it becomes necessary to enforce a Judge's Order by *Attachment*, there must then indeed be a previous Motion "to make it a *Rule of Court*." 2569 to 2574. See *Amendment, Information*.

Judgment

In *Ireland*—amendable here in *England*. 2157:
De bonis propriis. ibid. See *Covenant, Executors, Leases*.
Was entered up, for the Defendant; as of the Term when it was pronounced; at which Time he was alive, but is since dead. 2277.
Of *Ouster* against a Mayor, by Default, set aside; and Corporators let in to defend his Right (upon which theirs depended,) at their own Expence. 2279. See *Corporation*.

Jurisdiction—

Inferior ones must shew that they have Jurisdiction. 2244.
See *Certiorari*.

Justification

Of a *Trespass*—An accidental *involuntary* *Trespass* may be justified: A *voluntary* One can not. 2094. See *Trespass*.

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King's Counsel, &c.

Sir Fletcher Norton quitted the Bar.
Mr. Wallace appointed a King's Counsel. } 2297.

Leases—

By the *Master of the Rolls*, under 12 Car. 2. No. 49. 1975.
See *Rolls*.

By *Governors of Colleges in Ireland*—must reserve more than a Moiety of the true Value, at the Peril of the LESSEE. A Lease made by the Provost of Dublin College did not reserve more than £c. But the Provost covenanted for himself and Successors, to warrant it: But his Executors were not named in the Covenant. 2154.

1st. This Lease is void. 2157.

2dly. If it was not, Qu. Whether the Provost's Covenant would have bound his Executors. *ibid.*

3dly. If it would, yet Judgment ought not to be against them *de bonis propriis*. 2156.

The Owner of a House and Brewhouse enters into Partnership; assigns one fifth to his Partner; and covenants that the Partner shall reside in the House, and that if he himself dies, his Executor shall renew the Lease to the Partner. He can not maintain an Ejectment against the Partner, contrary to his own Covenant. 2209.

An Acceptance of a new GOOD Lease is an implied Surrender of a Former. But if the new Lease does not pass an Interest according to the Contract and the Intention of the Parties, it shall not operate as a Surrender of the former. 1980, and 2213.

Letters.

Qu. Whether Post Masters are obliged to deliver them out, within Post-Towns; or whether they must be sent for, 2149 to 2153.

But, clearly, a Post Master can't demand more than the settled Rates for sending them out. *ibid.*

Nor can he depart from or retract an established Usage "to deliver them at the Houses." 2150.

It has been since settled, in C. B. generally, "That in all Post-Towns, the Post-Master is bound to deliver them at the Houses of the Inhabitants, on paying the legal Postage only." *ibid.* (in the marginal Note.)

Lien.

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Lien.

The Courts lean, of late Years, in Favour of Liens, in Cases where there is either
1st. An *express Contract*. 2221.

2dly. Or an *implied one*; from the *Usage of Trade*, or the *Manner of Dealing*. ibid.

3dly. Or where the Defendant has acted as a *Factor*, ibid.

But where *personal Credit* only is relied upon, there is no Lien, beyond that which is given by the general Rule of Law. 2223.

A *Packer*, being in the Nature of a *Factor*, is intitled to a Lien for the general Balance. 2222.

Limitation

Of Estates—

Conditional Limitation—what it is; and in what Cases it may be implied. 1929 to 1944. See *Devise*.

Of Informations in Nature of *Q^{uo}d Warranto*—was unanimously fixed to twenty Years. 1963. See *Corporation, Corporator*.

This is a analogous to the Limitation of Writs of *Formedon*, and *Entry into Lands*, and also of dormant *Bonds*, Writs of *Error*, Bills of *Review*, *Redemption of Mortgages*, and *Proof of Possession* upon bringing *Ejectments*. 1963.

Literary Property

Fully discussed. 2303 to 2417. See *Authors*.

London.

The Court can not take judicial Notice of the Customs of London. 2032.

Calling a Woman "Whore," in London, is actionable there. 2418. See *Prohibition*.

Mandamus

To the *Justices and Clerk of the Peace of Derbyshire*; to register and certify a dissenting Meeting-House, pursuant to the Toleration-Act (1 W. & M. St. 1. c. 18) was granted, 1992.

To restore a Recorder. 1999 to 2007. See *Recorder*.

On 11 G. I. c. 4. § 2. shall be granted after an *Election in Fact*, if merely colourable and clearly void: For, the Words "no Election" mean no due, legal, valid Election. 2008 to 2011. The present Case was this—The Person

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son elected Mayor, was an Officer in the Army, just gone to North-America, without Probability of returning till after the Year would be expired. This Election was holden to be merely colourable, and clearly void. *ibid.*

The *Mandamus-Act* (9 Ann c. 20.) was intended for speeding Prosecutions, and to quicken the Removal of Usurpers. 2122, 2123. See *Information in Nature of Quo Warranto.*

A Return to a *Mandamus* "to admit, or shew Cause to the contrary," may shew one, or more, or any Number of Causes; provided they be consistent. 2045.

To restore an Alderman. Return—"That he had, on such a Day (which was a little more than four Months before the Amotion) DEPARTED with his Family from the Borough and its Liberties, and intirely left the same, with an INTENT to reside with his Family, for the future, elsewhere; and did from that Time to and at the Time of his Amotion, continually reside out of the Borough and its Liberties; contrary to the Duty of his Office: And for this Cause, they removed him." This Return was disallowed: This was not a total Deserion. 2088, 2089.

To go to Election, under 11 G. I. c. 4. § 4. The Swearing-in must be before the Officer then presiding. 2132.

If a Person has a RIGHT, without any other specific legal Remedy, a *Mandamus* shall be granted to him. 2186 to 2191. v. *Supra*, 1045. 1266. 1659. 1660,

To grant Probate of a Will—A "Lis pendens concerning the Validity of it" is a good Return. 2295.

Mariner.

They may all join in a Suit for Wages, in the Admiralty-Court: And in that Court, the Ship is liable to them, as well as the Captain. 1948. And that Court has Jurisdiction of their Contracts made in the quite ordinary Way; though it be in Writing, and made at Land. 1950.

But if the Agreement be special, or under Seal, a Prohibition shall go. 1950, 1951.

After Sentence, a Prohibition shall not go, unless the Want of Jurisdiction below appears upon the Face of the Proceedings. 2037, 2038. See *Prohibition.*

Marriage.—

All Conditions in Restraint of it ought to be construed with the utmost Rigour and Strictness in Favour of Devisees attempted to be so restrained. 2055 to 2057.

Alone—is no implied Revocation of a Devise, either real or personal: At least, it hath not yet been so holden by any Case. 2171.

But

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But marrying and having a Child, is so as to personal Estate ; and it seems, to real also. *ibid.* See Revocation, Devise.

All Marriage-Contracts are to be looked upon with a jealous Eye. 2230.

Such as are in Restraint of Marriage are illegal and void. *ibid.* to 2234.

The following one is of that Kind—“ I do promise Mrs. Catharine Lowe, that I will not marry with any Person besides herself. If I do, I agree to pay to the said Catharine Lowe 1000l. within three Months next after I shall marry any one else. Witness my Hand and Seal &c. at Newsham Peers. *ibid.*

1st. It is not a Contract “ to marry Catharine Lowe.” *ibid.*

2dly. Nor is it mutual ; neither does her Acceptance of it make it mutual and reciprocal. *ibid.*

Marshal.

When a capital Offender, being in the Marshal's Custody, is to be executed, the usual Place of such Execution is St. Thomas a Waterings. 2086.

The Appointment, Tenure, and Oath of the Marshal. 2183, 2184. See Statutes.

The general Order made upon the Appointment of a new Marshal, for the Reception of Prisoners. 2185.

On the Appointment by the Crown, of a new Marshal, pursuant to 27 G. 2. c. 17. § 2. the old Tipstaves, who had been appointed by the late Marshal, were not required to give larger Security than they had given before. *ibid.*

Master of the Rolls—See Rolls.

Meeting House—

Mandamus to register and certify one, pursuant to the Toleration-Act (1 W. & M. St. 1. c. 18.) 1991, 1992. v. *Mandamus.*

Mutual Debts—See Lien, Set-off, Statutes.

It is agreeable to natural Equity, that cross Demands should be set off against each other. 2220.

Positive Law first provided for it, in the Case of Bankrupts ; and afterwards, incompletely ; by 2 G. 2. c. 22. § 13. and 8 G. 2. c. 24. § 5. 2221.

But, of late Years, Courts lean on the Side of Liens. *ibid.*
See Lien.

New

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New-Trial

For *Excessiveness* of Damages—See *Verdict*.

In an Action for a *malicious Prosecution*—Want of *probable Cause* was objected, but not verified. It is *essential*, as well as *Malice*. See *Action for malicious Prosecution*. 1974.

After two concurring Verdicts, may be granted; upon *sufficient Circumstances*: It is *discretionary*, and depends upon the particular Circumstances. 2109.

It may be granted in *Ejectment-Cases*, as well as in other Cases; upon proper Grounds. 2224, 2225.

Non pros:

For Want of *declaring within Time*, in *Trespass against several Defendants*, ought to be *joint*; not *several*, One for each Defendant. 2418.

Non-Suit

May be *set aside*, upon proper Grounds properly supported: As where a Judge at *Nisi prius* Nonsuits a Plaintiff, and is mistaken. 1986.

Nuisance—

Indictments for *Nuisances* are *not quashed on Motion*: They must be *demurred to*. 2116.

Obiter Sayings—

Even of the greatest Judges, are *not to be depended upon*, if contrary to deliberate Determinations. 2068.

Orders

Of Sessions *quashing a Poor-Rate*, upon an Appeal, generally, without giving any Reason why they quashed it—is a good Order. They are *not obliged* to specify their Reasons. 2103.

Of Sessions—declared a *Prisoner irretrievable* on 5 G. 2. c. 41. because charged with an *Outlawry*; and remanded him. This *Negative Judgment* is a Nullity. 2120, 2127.

May be *taken off the File*, and remanded, where exclusive Jurisdiction is given to the Justices of the Peace. 2522. See *Certiorari*.

Quashing a *Poor-Rate* made on the Governors of St. Bartholomew's

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lomerw's Hospital. 2435 to 2442. v. *supra*, (under pa.
1063.) And see *Hospitals, Poor-Tax.*

Ordezs of Removal.

See the Quarto Edition of my Settlement-Cases.

Outlawry.

The Defendant was outlawed, after Conviction upon Two Informations for *Criminal Misdemeanours*. Resolved—

1st. The Defendant ought not (unless under very particular Circumstances,) to come in, *gratis*, in proper Person, at the Return-Day of the *Capias utlagatum*: He ought regularly to come in *Custody of the Sheriff*, by a *Return of "Cepi Corpus."* 2531 to 2535.

2dly. Outlawry in *Criminal Cases* differs greatly from Outlawry in *Civil Cases.* 2548 to 2555.

3dly. Wherein that Difference consists. *ibid.*

4thly. Before 3 Ann. A *Writ of Error* in any criminal Case was held to be merely *ex gratia.* 2550. But since 3 Ann. it ought not to be denied, in Cases under *Treason and Felony*, where there is probable Error: Which the Attorney-General should examine into, before he grants his *Fiat*. Such *Fiat* is previously necessary to the issuing of the *Writ of Error.* 2550, 2551.

5thly. But in Cases of *Treason and Felony*, the King's Pleasure "to deny the *Writ*" is conclusive; be the Error ever so manifest. 2551.

6thly. Since 3 Ann. It became an important Question, in all Crimes under *Treason and Felony*, "WHAT IS "an Error." And since that Time, the Court has not given Way to trivial Objections, though confessed by the Attorney-General. *ibidem.*

7thly. Such an Information may be brought by the King's *Solicitor-General*; without suggesting "that "the Office of Attorney-General is vacant." 2553 to 2555.

8thly. Process of Outlawry lies upon *Informations* of this Kind. 2556, 2557.

9thly. Every Offence committed against the Peace subjects the Delinquent to the Process of Outlawry; even though there be no *actual Force*. Force is not the Criterion, on which the Process of Exigent was founded at Common-Law. 2558, 2559.

10thly. Proclamations were not necessary: They are not required, in this Case, either by Common-Law, or by any Statute. 2559.

11thly.

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11thly. If they had not been necessary, this *Return* of them is *too loose*; being only “ I have caused public Proclamation to be made in Manner and Form as I am within commanded.” ibid.

12thly. The first *Exaction* was returned to be “ at my County-Court held at the Three Tuns in Brook-Street near Holborn in the County of Middlesex :” And the other Four, “ at my County Court held at the same Place.” By this Return, it is shewn, and does appear, (exclusive of the requisite *technical Form*,) that this County-Court was the County-Court of Middlesex, and not of any other County” and also “ That Brook-Street near Holborn lies in the County of Middlesex.” 2560, 2561.

13thly. But a *TECHNICAL FORM of Words*, in the *Description of the County Court* at which an Outlaw is exacted, is requisite: viz. that after the Words “ at my County-Court,” should be added the *NAME* of the County; and after the Word “ held,” should be added “ FOR the County.” 2563 to 2565. The Authorities “ that such Words are formally necessary,” begin from 7 *Jac. 1.* as to the former Expression; and from 18 *C. 2.* as to the latter. 2565.

14thly, *For Want* of these *technical Words*, the Outlawry was *REVERSED*; as the Authorities were on the favourable Side, in a *Criminal Case* highly penal: though it was acknowledged that there is neither Law, Reason, nor Common Sense, in requiring them; and that it does most manifestly appear upon this Record, “ that the Court in Question was of, and holden for the County of Middlesex.” ibid.

Packer—

Where he has a *Lien* for the general Balance. 2222.

Parish—

Their Obligation to repair High-Ways, 2511, 2512. See *High-Ways*.

Parliament.

The Precept (under 7, 8 *W. 3. c. 25. § 1.*) ought to be *despatched* to the Returning Officer. 2272.

The *TIME* of the *Delivery* of it to the Returning Officer may be *material* to be proved in an *Action* against the Returning Officer himself; but not in an *Action* against a Third Person, for *Bribery*. 2275, 2276.

Party-

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Party-Walls

Between Stables. 2298. See *Statutes (11 G. 1. c. 28.)*

Physicians—

Their Incorporation, Constitution, and By-Laws. 2186,
2187.

Qu. Whether *London Licentiates* are Members of the College,
or not. 2194.

Candidates are to be examined by the *Comitia minora*: But their
Approbation is *not final*. They are to be proposed to the
Comitia majora; and elected by them; before they can claim
to be admitted. 2188 to 2194. See *Mandamus*.

Qu. Whether *Licentiates* have a Right to demand *ADMISSION*
into the Collège. 2195 to 2202.

Clearly, they have no Right to *Vote* at Corporate Elections,
before actual Admission. *ibidem*.

They can not, by their *By-Laws*, legally restrain their Number
of Fellows. 2197 to 2201.

Play—

Qui tam Action upon 9 Ann. c. 14. § 2. for Money won at
Play and its triple Value, how to be brought, and what
the Judgment. 2018 to 2022. See *Gaming*.

Pleading

To an Information in Nature of a *Quo Warranto*, where a
Defendant has two *Fines*. 2143 to 2148. See *Information in Nature of Quo Warranto*.

Matter of *Substance* must be pleaded: But Matter of *Inducement* only may be given in *Evidence* upon the general
Issue. 2469.

So may the Matter of an exempting *Proviso* contained in the
same Act of Parliament which gives the Penalty. *ibid.*

The Defendant having been taken in *Execution on a Ca. Sa.*
was afterwards discharged out of *Custody*, by *Consent of the Plaintiff*, upon agreeing to pay certain Sums at stipulated
Times; Part of which he had paid: But failing in the
remaining Payments, the Plaintiff brought an *Action of Debt* upon the old Judgment. This Matter being thereunto
pleaded, the Plaintiff in his *Replication* acknowledged it;
and yet concluded with demanding the whole Sum due
upon the old Judgment. Defendant demurred; and had
Judgment. 2483.

111. An *Action of Debt* will not lie on the old Judgment
after a *Ca. Sa.* and Discharge by *Consent of the Plaintiff*. *ibid.*

2dly.

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2dly. The Replication is *repugnant*, in demanding the whole Sum, after acknowledging to have received Part. *ibid.*

Policy of Insurance.

Da Costa underwrote a Policy insuring to *Michael Firth* “ lost or not lost, *Lisbon* to *Falmouth* or what other Port in *England* where his Majesty shall direct his Packets appointed between *Lisbon* and *England*, being on each and every Packet Boat which shall sail on the said Voyage; to commence the first Day of *October* 1763, and to continue One whole Year or to the first Day of *October* 1764 inclusive; upon any Kind of Goods and Merchandises whatsoever; beginning the Adventure immediately from the loading such Goods and Merchandises at *Lisbon*, and to continue till safely landed.” It was agreed to be lawful to stop and stay at any Port or Place whatsoever, without being deemed a Deviation, without Prejudice to the Insurance. “ The said Goods and Merchandises, by Agreement, are and shall be valued at the Sum insured on such Packet Boat, without further Proof of Interest than this Policy: And to make no Return of Premium for want of Interest, being on Bullion or Goods.” In Case of Loss or Misfortune, it was to be lawful for the Assured and their Servants to travel for the Defence or Recovery of the Goods, without Prejudice to the Insurance: To the Charges whereof the Assurers were to contribute, according to the Quantity of his Sum insured. The Consideration was Ten *per Cent*: And in Case of Loss, the Assured to abate Nothing. All other Goods, except some which were particularly specified, were to be free from Average under Three Pounds *per Cent*; unless general, or the ship stranded.

The said *Firth*, the Insured (the now Defendant,) had an Interest, in Bullion, on Board the *Hanover-Packet*, being One of the King’s Packets between *Lisbon* and *England*: Which Packet was, on the 2d of *December* 1763, totally lost, off *Falmouth*, in a Voyage between *Lisbon* and *Falmouth*.

The Loss was adjusted, in Writing under the Policy, in the Words following—“ Adjusted a Loss on this Policy, at 100*l. per Cent*. The *Hanover-Packet*, Captain *Sherborn*, being totally lost at *Falmouth*. Should any Salvage hereafter be recovered, the Insured promises to refund to the Insurers whatever he may so recover, in such Proportion as the Sum insured bears with the whole Interest. London, the 23d of *October* 1764, for *Richard Seward—Michael Firth*.” *Da Costa* accordingly paid this Adjustment to *Firth*.

In *April* 1765, the Iron Trunk which contained all the Bullion was fished up: And thereby, All the Bullion recovered, without

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without ANY Loss or Prejudice whatever ; and delivered to *Michael Firth*, the now Defendant. But the Defendant *Firth's Expence of Salvage* amounted to *63l. 8s 2d.* and deducting that Sum for Salvage, the Nett Proportion of the Defendant's Share came to *200l. 11s. 9d.* The Plaintiff *Da Costa's* Proportion thereof, in respect of his Subscription, amounted to *48l. 4s.* which was paid into Court, upon the present Action.

The present Action was an *Indebitatus Assumpsit* brought by *Da Costa*, the Insurer, against *Michael Firth*, the Insured, for *200l.* for so much Money had and received by *Firth* to his Use. On *Non Assumpsit* pleaded, Issue was joined : the Cause tried ; and the above Case stated. The Question was—“ Whether the Plaintiff, upon this Case, is not in-“ titled to recover in this Action.” 1966.

The Court ordered the *Poista* to be delivered to the Defendant : For the Adjustment shews, that each Side had given it up as a *total Loss*. It was a solemn *Abandonment*, and an Agreement “ that the Insurers should be content “ with Salvage in such Proportion as the Sum insured bears “ to the whole interest.” 1970.

They held it to be a *mixed Policy*, and of a *peculiar* sort, and a *valued Policy* ; but a *fair One*, and *without Fraud* or *Misrepresentation*, and within the exception of 19 G. 2. c. 37. And therefore the Insured was intitled to receive as for a *total Loss*. The Insurer agreed to the Value ; and is concluded to dispute it. 1969, 1970.

Poor-Tax. See Orders, Statutes, (43 Eliz. c. 2. § 1.) Manors, Quit-Rents, Heriots, Hospitals, Rates, Mines, Overseers.

A *Superintendent of Salt-Works*, receiving a Salary by monthly Payments, and removable at Pleasure, was rated to the Poor, “ upon the Account of his *Salary only*.” The Court held, that this is *not such a Species of Property* as can be rated to the Relief of the Poor, as personal Estate within the Parish. 2014, 2015.

Personal Property and Stock and Trade—Whether *rateable* to the Poor-Tax, or not. 2294.

Is to be paid by the *Occupier* : And the Person rated must be rated in that Character. 2439.

Hospital Officers may be rated as *Occupiers*, for their distinct Apartments. Ibid.

But *Hospital Servants* can not : Neither can the *Corporation*. ibid.

The *Poor* in *Hospitals* are properly the *Occupiers* : But they can not be rated at all. ibid.

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Post-Master. See Letters.

Poundage. See Sheriff.

Practice.

A Writ of Possession upon a Judgment in Ejectment, *tested* before the *Death of the Lessor of the Plaintiff*, but not *actually sued out* till after his Death, is regular : It has *Relation* to the *Teste.* 1971

Costs upon a *Remainet.* 1986 to 1990. See *Remanet.*

Attorney for Plaintiff neglecting to charge the Defendant being in Custody, with a Declaration, *within two Terms*, is liable to the Plaintiff in an *Action*, but not in a summary Way. 2060. to 2063. See *Attorney.*

The Court will not grant an *Information* for a Misdemeanour, upon the Motion of the *Attorney General* on behalf of the *Crown*; because he may do it himself, if it appears to him to be proper. 2090. v. *supra* (under pa. 1565.)

Security for answering Costs—not required of a *Foreign Plaintiff*, nor of a Plaintiff gone abroad, having left no Effects in *England.* 2105.

A Defendant under an *Attachment* must *answer Interrogatories*: He can't come in, and *confess* the Contempt, before answering Interrogatories. 2106.

Bail is *excepted to*, and therefore does not justify ; but omits getting his *Name struck out* of the Bail-piece: He may, when attached, apply for an *Exoneretur*, to be entered *nunc pro tunc.* 2107. See *Bail.*

Indictments for Nuisances—must be demurred to : The Court do not *quash* them on Motion. 2116.

About holding to special Bail—The King's Bench and Common Pleas differ, where an Action of Debt is brought upon a *Judgment for upward's of 10l.* but the Original Cause of Action was *under 10l.* The former discharge on *Common Bail*: The Latter require *special.* 2118.

Rule to shew Cause why Costs should not be paid to the Prosecutor out of the Money levied on a *forfeited Recognizance.* The King is only a *Trustee* for the Party. 2119.

Concerning Costs on removing an Indictment by Certiorari at the Instance of the Defendant; where the Defendant has been convicted and fined, and the Prosecutor has received a Third of the Fine. 2126. See *Costs.*

Concerning allowing Interest, upon Affirmance of Judgments. 2128. See *Interest.*

On

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- On a *Rescue* returned. 2129. See *Attachment, Rescue*.
Motions in Arrest of Judgment must be made within the *first Four Days* of the Term : But *Sunday* is not to be esteemed One of the Four. 2130.
Of *surrendering Principal*, by *Bail*—They have till the *quarto die post (sedente Curia)*, where 'tis by *Original*. 2134. See *Bail*.
Warrant for a Tales, on a Trial in a county *Palatine*—is to be from the *King's Attorney-General*. 2173, 2174.
Concerning delivering *Declarations* by the *Bx.* 2181. See *Declaration*.
Rules of Practice may be *dispensed* with, or *relaxed* by the Court, upon sufficient Reasons ; being only made in *Advancement of Justice*, 2271.
Variance between *Declaration* and *Process*. 2417. See *Variance*.
A *Non pos* : against the Plaintiff, for not declaring within Time, in an Action of *Trespass* against several, ought to be joint ; not a distinct One for each Defendant. 2418.
A *Scire facias in Error* needs not lie *Four Days* in the Office ; as a *Scire facias against Bail* must. 2439.
A plaintiff obtained Judgment. The Defendant brought a *Writ of Error*, and transcribed : and it remains undetermined. The Plaintiff brought an *Action of Debt* upon his Judgment, and got Judgment by Default ; and took out Execution. The Court stayed his *Proceedings*, till the *Writ of Error* should be determined. 2454, 2455.
On the *last Day of a Term*, a Motion “to answer the *Matters of an Affidavit*” can not be made. 2502. v. *supra* (under pa. 651.)
After *Bail had justified*, the Plaintiff's Attorney without *disclosing* this) obtained a *Side-Bar Rule* “to discontinue “upon Payment of Costs ;” and then brought a *new Action*. The Court discharged the *Side-Bar Rule*. 2502, 2503.

Principal and Accessary.

Principal in the second Degree. 2073 to 2086. See *Riot*.

Printing.

When and where, and by whom, first invented : And *when, how, and by whom, first introduced into England*. 2410 to 2416.

Prison. Prisoners—

Not charged with a Declaration within Two Terms, are intitled to be discharged ; and the Plaintiff's Attorney liable

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liable to an *Action* for his Neglect. 2060 to 2063. See *Attorney, Practice, Statutes* (4 & 5 W & M. c. 21.)
Brought up to the Sessions to be discharged on 5 G. 3. c. 41. The Sessions declare him irretrievable because charged with an *Outlawry*; and remand him. This negative Judgment is a Nullity. 2119, 2120 and 2127.
Fined for Perjury—can't be discharged as an insolvent Debtor. This is not a Debt, but a *Punishment*. 2142.
The Act of 32 G. 2. c. 28. § 13. construed favourably for them. 2526.

Prohibition—

To the Admiralty-Court, in a Suit there, for Seamen's *Wages*, shall go, if the Agreement be *special*, or *under Seal*. 1950, 1951. See *Mariners*. Confirmed *post Pa.* 2037, 2038. But

After sentence a prohibition shall not go, unless the Want of Jurisdiction in the Court below appears upon the *Face of the Proceedings*. 2030 to 2040.

If the Ground of applying for a Prohibition be *debors* the Proceedings, the Truth of the Suggestion must be verified by *Affidavit*: Otherwise, if it appears upon the *Face of them*. *ibid.*

To the Consistory Court of London, in a Cause for calling “Whore” in London—There must be *Affidavit* of the *Custom*, and that the Words were *spoken there*. 2032.

Such a Custom must either be *pledged*, or verified by *Affidavit*: A *Suggestion* alone is not sufficient. 2039, 2040.

Lies to the Spiritual Court, to stay their Proceedings for calling “Whore,” in London, where the Words are, by the *Custom*, actionable. 2418. v. *supra*, 2032.

Property

Literary—fully discussed. 2303 to 2418. See *Authors*.

Quo Warranto. See *Information in Nature of a Quo Warranto*.

Gamsgate-Harbour.

The *Duty* imposed by 22 G. 2. c. 40. is not payable by Vessels not going through the *Downs*, but passing by the North-east Side of the *Godwin Sands*. 2258.

Rates.

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Rates.

A Poor-Rate was quashed generally, by the Sessions upon an Appeal, without giving any Reason why. They can't be compelled to specify their Reasons: It is left to them, to exercise their Discretion. 2103. v. *infra*. 2494.
Personal Property and Stock in Trade—whether rateable or not.

2294.
Poor-Rates made upon Governors of Hospitals, or their Officers (having distinct Apartments) or their ordinary Servants. 2435 to 2439. See *Hospitals, Poor-Tax*.

Whoever is rated to the Poor, must be rated as Occupier. *ibid*.
A Poor-Rate confirmed by the Sessions shall not be set aside, unless it appears manifestly to be unequal. 2494. v. *supra*, 2103. The Rate in Question assessed Occupiers of Lands, at three-fourths of the yearly Value; and Occupiers of Houses, at two-fourths: To which, all the Parish had agreed; and yet One of them, long afterwards, appealed from it. The Court refused to quash the Order of Sessions which confirmed it. *ibid*.

Recognizance—

Forfeited—The King is only a Trustee for the Party. 2119.
See *Practice*.

Under 5 & 6 W. & M. c. 11. § 2, 3. (made perpetual by 8 & 9 W. 3. c. 33) where the Defendant has been convicted and fined; and the Prosecutor has received one-third of the Fine: So much shall be deducted out of the Costs. 2126.
See *Costs, Certiorari*.

Recorder.

A wilful Neglect to attend the Sessions, is a Cause of Forfeiture: But a single Instance of Absence, where Nothing of Importance was expected or likely to happen, nor any Notice given to attend, is not so. 1999 to 2008.

Relation.—See *Fiction, Teste, Pleading, Declaration*.

An *Admittance* relates back to the Time of the *Surrender*. 1961, 1962.

So does a *Disseisee's Entry or Release*, to the Time of the *Disseisin*. *ibid*.

So, an *Escheat* after the Date of a Will. *ibid*.

Of a *Conveyance*—The whole of it shall be taken together: And the several *Parts* of it shall relate back to the *principal Part*. 1962.

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Of a *Writ of Possession*, to its *Teste*. 1971. See *Ejectment, Practice*.

Remanet.

If a Cause goes off upon a *Remanet*, the general Rule is, “ That the *Costs* occasioned thereby shall attend the Event of the Cause.” 1990. But this general Rule implies an Exception of such particular Cases as are clearly distinguished by their Circumstances, from being within the Reason and Principle of the general Rule: Provided the Application be in due Time. *ibid.*

Rescued.

Fine for it. 2130. See *Sentence, Attachment, Practice*.

Restoration Day.

Only one Judge goes to *Westminster-Hall*: But necessary Business may be done. 2089.

Return—

To a *Mandamus*—may contain one, or more, or any Number of Causes; provided they be *confident* with each other. 2044 to 2046.

Reversioner.

May bring an *Action* for an Injury done to the *Value* of the Inheritance. 2141.

Revocation

Of a *Will*—A subsequent Admittance according to the Tenor of a prior Surrender, is no Revocation. 1962. See *Co-pyhold*.

Of a *Will*—A Remainder-Man in Fee makes his Will: Afterwards, the Tenant for Life dies, in the Testator's Life-Time. The Will is not revoked thereby. *ibidem*.

Of a *Will*—by Alteration of Circumstances; and particularly, by marrying and having Children. 2167 to 2171.

1st. As to personal Estate—Marriage and a Child is a Revocation: But Marriage alone has not yet been so holden. 2171.

2dly. As to real Estate—The Reason is the same: And great Opinions have been so. *ibid.* See *Devise*.

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Of a *Will of Land*.—It was made in 1757: The Testator duly executed a second, in 1763. Both of them devised the Lands to the Defendant. The former was never cancelled: The latter was cancelled by the Testator himself. Both were in his Custody, at his Death. The first Will stands good. 2514, 2515.

Niot.

John Royce was indicted at a Session of *Oyer and Terminer* on 1 G. 1. Stat. 2. c. 5. § 5. for a capital Felony, as Principal in the second Degree. A special Verdict found, that he and divers others unknown, to the Number of One Hundred and more, did with Force and Arms, unlawfully, riotously and tumultuously assemble together, to the Disturbance of the public Peace; and being so assembled, divers of them did with Force and Arms, unlawfully and with Force, feloniously begin to demolish and pull down a Dwelling-House in the Indictment specified; and that *Royce* was present, and did then and there encourage and abet the said Persons unknown in beginning to demolish and pull down the said Dwelling-House, by then and there SHOUTING and using EXPRESSIONS to incite the said Persons unknown so to do: But that he did not with Force begin to demolish or pull down, or do any Act with his own Hands or Person for that Purpose; otherwise than as aforesaid. 2073 to 2086.

1st. This Offence, which was before this Act of Parliament only a Misdemeanour, is by it made Felony without Benefit of Clergy. 2078, 2080.

2dly. Persons present, aiding and abetting, are Principals in the second Degree, and are within this Statute, and ousted of Clergy. 2076. 2081. 2084.

3dly. This Verdict sufficiently finds this Man to be a Principal in the second Degree. 2083.

4th. The following Objections in Arrest of Judgment were over-ruled: viz.

1st. The Commission of Gaol-Delivery does not, as set out, shew that the Judge was of the Quorum. 2084.

2dly. No Issue is joined upon this Record. *ibid.*

3dly. Non constat by whom the Justices were assigned. *ibid.*

4thly. Three were indicted: But it don't appear what became of the other Two. Therefore the Record is incomplete. 2085.

Niberg—

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Rivers.

Fishery in them. 2162 to 2165. See *Fishery*.

Rolls—

Leases by the Master of the Rolls for the Time being, under 12 C. 2. No. 49. 1975.

1st. They may be made *in Trust for himself*. 1979, 1980.

2dly. Though the Proviso restrains from making any new or concurrent Lease (after having been once letten according to the Power,) until *within seven Years of the Expiration* of the Lease in being, nor for longer than 21 Years from the making; yet this Restriction is not confined to Expiration by *Efflux of Time*, but includes *Surrenders*, and may be repeated *toties quo-ties* upon proper Surrenders; so that the Reversion be not charged for longer than 21 Years in the whole. *ibid*.

3dly. The Acceptance of a new Lease implies a Surrender of the old one. *ibid*: Provided the new Lease be a good one. *ibid*.

Rules and Practice of the Court. See Practice.

Rules of Practice may be dispensed with or relaxed by the Court, in Advancement of Justice. 2271. See *Practice, New Trial*.

Rules, General.

What Exceptions are implied. 1986 to 1990. See *Remainer*. They ought not to be laid down so strictly and rigidly, as to occasion greater Inconveniences than they were intended to prevent. 1996.

Scire Facias

In Error needs not lie four Days in the Office; as a *Scire facias* against Bail must. 2442. v. *supra*, 1723.

Seamen. See Mariner.

Security for Costs. See Costs, Practice.

Sentence

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Sentence on Criminals—

On 5 & 6 E. 6. c. 14. for *forestalling* the Market. See the Stat. § 3 & 4, and Title “*Ingrossing*.”

On 5 G. 1. c. 27. § 1. is, for the first Offence, a Fine *not exceeding* 100l. and *Imprisonment* for three Months, and till Fine paid. For the second Offence, *Fine at Discretion*; and *Imprisonment* for twelve Months, and till Fine paid. 2026.

On 23 G. 2. c. 13. § 1. (on the same Subject, against enticing Artificers abroad) For the first Offence, 500l. for each Artificer seduced; and *Imprisonment* for twelve calendar Months in the Common Gaol, and till the Forfeiture be paid. *ibid.*

On Return of a *Rescue* (upon mesne Process) is discretionary: Contrary to *Sir T. Jones*, 198. and 2 *Salk.* 586. Both of which Cases assert the *constant* Fine to be *four Nobles* each. 2130.

Upon Mr. *Wilkes*—for his two Libels, (seditious and obscene) 2574.

Of *Imprisonment*—may be to commence at a future Time; viz. from and after the Determination of an Imprisonment to which he was before sentenced for another Offence. *ibid.* and 2577.

Set-Off—

Needs not to be pleaded or given Notice of, by the Defendant sued in an Action for Money had and received to the Plaintiff's Use; where the Defendant had paid the Plaintiff his whole Demand, except what he *retained* for his Labour and Service. He may give this in Evidence without Notice. 2134.

This is not a *Cross Demand*, or *mutual Debt*; but a *Charge*, out of the very Sum demanded. *ibid.*

Sheriff. See Return, Bankrupt, Pannel.

Poundage—is by 29 Eliz. c. 4. For every twenty Shillings, twelve Pence, for the first 100l. and six Pence for every twenty Shillings of the Residue. 1981.

But the *Crown* are not bound by this Act. *ibid.* and 1983. However, an Action brought in the Exchequer by the Sheriffs of *London*, upon a Bail-Bond taken by them in their own Names, for the Appearance of a Defendant taken up upon an Exchequer Process on the Prosecution of the King's Attorney-General on Behalf of the Crown; for Custom-House Penalties and Forfeitures; and a *Testatum capias ad satisfaciendum* to the Sheriff of *Hertfordshire* against

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against the Bail; can not be considered as the *Suit of the Crown*, though averred to be for the *Benefit*, and on the *Behalf*, and at the *Expence* of the Crown: Nor shall the Sheriff who executed it, be precluded from his Poundage. *ibid.*

On taking a Person upon a *Capias Utlagatum*, what he is to do. 2537 to 2542. See *Outlawry*, *Statutes* (4 & 5 W. & M. c. 18.)

Slander of Title.

To maintain such an Action there must be **MALICE**, either express or implied. 2425, 2426. And the Words spoken must go to defeat the Plaintiff's *Title*.

If they are spoken, to protect a Person's own Property, and prevent others from being cheated, the Speaker is excusable. *ibid.*

The Attorney delivering such a Person's Message, is not liable to an Action; even though he varies from it, in immaterial Circumstances and without Malice. *ibid.*

Soldjer.

Officers and Soldiers in the Service of the *East India Company*. 2419 to 2422. See *East India Company*.

Stamps—

9 G. 3. c. 37. § 4. Which discharges from Penalties Persons who have incurred them, and shall pay the Duty on or before 1st September 1769, bars only future Actions; but does not discharge a Defendant against whom there has been a Verdict before obtained. 2460 to 2463.

Statutes. See Construction.

12 C. 2. No. 49. empowering the *Master of the Rolls* to make *Leafes*, in order to new-build the old Houses belonging to the Rolls. 1975. See *Rolls*.

29 Eliz. c. 4. concerning Sheriff's Poundage. 1981. See *Sheriff*.

33 H. 8. c. 39. § 4. requiring Suits for the *King's Debts* to be brought in the *Name of the King*, and of no other Person. 1984. See *Sheriff, ut supra*.

1 W. & M. Stat. 1. c. 18. (the Toleration-Act) *Mandamus* to register and certify a *Meeting-House*. 1991, 1992. See *Mandamus, Meeting-House*.

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- 12 G. 1 c. 29. § 2. *Affidavit* to hold to *special Bail*. 1992 to 1996. See *Bail*.
- 11 G. 1. c. 4. § 2. "No *Election*," means, "no *due, legal, valid Election*." 2008 to 2011. See *Mandamus*.
- 43 Eliz. c. 2. § 1. A *Salt-Officer* not rateable to the *Poor*, for his *Salary only*. 2015. See *Poor-Tax*.
- 7 Ann. c. 12. § 3. The Defendant must be in the Service at the *Time* of the Arrest. 2016, 2017. See *Ambassador*.
- 7 Ann. c. 12. § 5. The registering his Name is no Condition precedent: It relates only to the Proceeding against the *Bailiff*. *ibid*. See *Ambassador*.
- 9 Ann. c. 14. § 2. *Qui tam Action* for Money won at Play, and the triple Value of it, brought by a common Informer. The Offence charged at *Westminster* in *Middlesex*; and Judgment for the Informer and the *Poor of St. Paul's, Covent-Garden*: Also Judgment that the Informer have *Damages for Detention* of the Debt, and Costs of Increase. Affirmed for the *Debt*: Reversed for the *Damages and Costs*. 2018 to 2021. See *Gaming*.
- 5 G. 1. c. 27. § 1. } The latter seems to be a *Repeal* of the
23 G. 2. c. 13. § 1. } former. 2026. See *Sentence*.
- 9 Ann. c. 20. (the *Mandamus-A&t*) was intended for speeding Prosecutions, and to quicken the Removal of Usurpers; and intrust the Court with the *Discretion* of granting Leave to private Informers, to use the King's Name: But this Leave ought to be granted upon proper Circumstances only. 2120 to 2125—See *Information in Nature of a Quo Warranto*.
- 1 J. 1. c. 22. § 5. concerning tanning Leather. Indictment on it quashed; because several Defendants were joined in it. 2046.
- 4 & 5 W. & M. c. 21. for delivering *Declarations to Prisoners*. 2060 to 2063. See *Attorney, Practice*.
- 7 G. 2. c. 8 to prevent the infamous Practice of Stock-jobbing. 2069 to 2072. See *Bond, Stock-jobbing*.
- 1 G. 1. Stat. 2. c. 5. § 5. 2073 to 2086. See *Principal and Accessary, Riot*.
- 27 H. 8. c. 20. §. 1. } discussed both at Bar and Bench;
32 H. 8. c. 7. §. 4. } particularly, whether the *Attachment* for *Contumacy and Disobedience* can be applied for by the *Ecclesiastical Judge*, on 27 H. 8. c. 20. §. 1. before Sentence. 2095 to 2100. See *Tithes*.
- 29 G. 2. c. 3. § 17. *Executorial Contracts* for Goods are not within this Clause. 2101.
- 6 Ann. c. 16. § 5. A Person who negotiates and concludes Bargains for Stocks, for Brokage and Hire, is a *Broker* within this Clause. 2103, 2104.
- 12 G. 1. c. 29. § 1. *Bail* on an Action of *Debt* on a *Judgment* for upwards of 10*l.* where the original Cause of Action was

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- was under 10*l.* The Common Pleas hold to *special Bail*: The King's Bench do not. 2117, 2118.
- 5 G. 3. c. 41. for the Relief of *insolvent Debtors*—A Proceeding upon it. 2119, 2120, and 2127. See *Insolvent Debtors, Prisoners*.
- 5 & 6 W & M. c. 11. §. 2, 3. } Costs to be taxed to the Pro-
8 & 9 W. 3. c. 35. §. 1. } secutor. 2126. See *Certi-
orari, Costs*.
- 11 G. 1. c. 4. §. The *Swearing in*, under a *Mandamus*, must be before the Officer then presiding at such Election under the Statute. 2132.
- 32 H. 8. c. 42. } 2 33. See *Barbers, Surgeons*.
- 18 G. 2. c. 15. } 2 33.
- 10 & 11 C. 1. c. 3. 2. *Irish*. 2155. See *Leases*.
- 27 G. 2. c. 17. or *revesting in the Crown* the Power of appointing the *Marshal*, regulating the Office; and rebuilding the King's Bench Prison. 2183, 2184. See *Marshal*.
- 5 & 6 E. 6. c. 14. §. 3. 4. See *Ingrassing*.
- 2 G. 2. c. 22. §. 13. } The Provision does not go to *Goods* or
8 G. 2. c. 24. §. 5. } other *specific Things* wrongfully de-
tained. 222. See *Mutual Debts*.
- 34 & 35 H. 8. c. 20. making void Common Recoveries of Land in *Tail*, where the *Reversion* is in the *Crown*: It protects only Gifts of the *Provision of the King*, and in *Reward of Services*. If the Grant be founded on a former *Right*, it is not within the Protection of this Act. 2223, 2224.
- 8 Ann. c. 25. (a *private Act* about bringing *fresh Water* into *Liverpool*) 224. See *Certiorari*.
- 22 G. 2. c. 40. concerning *Duties to Ramsgate Harbour*. 2258. See *Ramsgate Harbour*.
- 7 G. 3. c. 40. concerning *Turnpike Roads* } Carriages em-
7 G. 3. c. 42. concerning *public High Ways* } ployed only in
8 G. 3. c. 5. concerning *public High Ways* } carrying any
One Piece of Timber (or Stone) are excepted out of the
Acts concerning *public High Ways*; but not out of those
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- 7 & 8 W. 3. c. 25. §. 1. The *Precept* ought to be directed to the Returning Officer. 2270. See *Parliament*. The *TIME of delivering it to him* needs not to be proved, in an Action against a Third Person for *Bribery*. 2275, 2276.
- 5 G. 3. c. 14. §. 3. Conviction upon it, quashed. 2279 to 2282. See *Conviction, Fines*.
- 2 G. 2. c. 24. §. 8. indemnifying the *Discoverer of Bribery* at Elections to Parliament. 2283 to 2287. See *Bribery*.
- 43 Eliz. c. 2. §. 1. *Personal Property and Stock in Trade*—whether *rateable to the Poor-Tax*. 2290 to 2295.
- 11 G. 1. c. 28. does not extend to *Party-Walls between STABLES*: It is confined to *Party-Walls between HOUSES*. 2298.

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- 8 Ann. c. 19. secures to Authors their *Copy-Right*, for Fourteen Years ; and afterwards, for fourteen Years more, if living at the End of the first Fourteen Years. 2303 to 2418. See *Authors, Literary Property*.
- 13 G. 2. c. 19. § 5. prohibits *Horse-Matches* for less than the real and intrinsic Value of 50*l.* unless at *Newmarket* or *Black Hambleton*. 2432, 2433. See *Horse-Match*.
- 5 G. 2. c. 30. § 7. discharges conforming Bankrupts from all Debts due and owing at the Time of their becoming Bankrupts. But contingent Ones, not proveable under the Commission, are not discharged by the Certificate. 2446. See *Bankrupts*.
- 5 Eliz. c. 4. § 31. (requiring having served an *Apprenticeship*) does not extend to give the *Penalty* against *Journeymen*. 2449, 2450. See *Trade and Trader*.
- 7 G. 3. c. 42. §. 1. (for the Amendment and Preservation of public *High Ways*) Annual Lists are to be made in every September ; and to be returned to the Justices, who are to nominate Surveyors. Qu. Whether the Constables, Headboroughs, Tythingmen, Surveyors, &c. are such *constituent Parts* of the Assembly who are to make the List, that it is essentially necessary for some of each Denomination to be present at the making of it. It rather seems that the Legislature only meant that it should be a *full Parochial Meeting*. 2454.
- 9 G. 3. c. 17. § 4. (*discharging Persons who had omitted to pay Stamp Duties*, and should pay them on or before 1st September 1769,) has no *Retrospect* to discharge from a *prior Verdict*, 2460 to 2463. See *Stamps*.
- 2 G. 2. c. 24. § 8. indemnifying the Discoverer of *Bribery at Elections to Parliament*. 2464 to 2470. See *Bribery, Pleading*.
- 1st. What must be pleaded : What must be given in Evidence. *ibid.*
- 2d. Who shall be considered as Discoverer : The *Prosecutor* or the *Witness*. *ibid.*
- 2 G. 2. c. 24. § 7. *No Damages for Detention of the Debt*. 2491. See *Bribery, Error*
- 16 & 17 C. 2. c. 8. § 3. *Bail in Error*, upon a Judgment in *Ejectment*, justify in double the Rent. 2502.
- 2 G. 2. c. 24. § 8. does not make or consider the Plaintiff *clusively*, the Discoverer. 2504, 2505. See *Bribery*.
32. G. 2. c. 54. (for repairing the Road from *Dewsbury* to *Ealand in Yorkshire*,) excludes the Jurisdiction of the Courts of *Westminster-Hall*. 2522. See *Certiorari*.
32. G. 2. c. 28. (for Relief of Debtors with Respect to the Imprisonment of their Persons) § 13. which requires Fourteen Days Notice—construed favourably for them. 2526.
- 4 & 5 W. & M. c. 18. “for the more easy Reversal of Outlawries in the Court of King’s Bench” — is perhaps confined

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fined to *civil Actions*, and does not at all extend to *Criminal Misdemeanours*: But Nothing is clearer than that Cases after *Conviction* of such a Misdemeanour are *not* within it. 2537 to 2542. See *Bail, Outlawry*.

Stock-jobbing—

The Act of 7 G. 2. c. 8. §. 5. does not extend to invalidate a Bond given for *reimbursing* a Compounder of Differences who had paid Money for himself and *another jointly concerned* with him, the Sum he had paid on that other Person's Account. 2069 to 2073. See *Bonds*.

Sunday—

Is *not reckoned* as One of the *Four Days* allowed for making Motions in Arrest of Judgment. 2130. See *Practice*.

Surgeons—

Of *London*—incorporated with *Barbers of London*, by 32 H. 8. c. 42. but *separated* from them by 18 G. 2. c. 15. 2133. But the latter Act *only dissolves the Union*: The two separated Companies remain under the *same Regulations* as before. *ibid.*

Surrender—

Of a *former Lease* is *implied*, on the *Acceptance of a new One*; provided the second Lease be a *good One*: Otherwise, not. 1980. v. next below.
The same Point determined. 2213, 2214. v. last above:
And see *Lease*.

Surveyors

Of *Highways*—How to be nominated. See *High-Ways and Statutes* (7 G. 3. c. 42. §. 1.)

Swearing-in—

Of a *Corporate-Officer* elected under a *Mandamus* pursuant to 11. G. 1. c. 4. §. 4. must be before the Officer *presiding at such Election*. 2132.

Tales.

De Circumstantibus—In a *County-Palatine*—The King's Attorney-General is the proper Person to grant the *Warrant* for the Tales. 2173, 2174.

Tail

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Tail

Of the Gift of the *Crown*; Reversion in the Crown. 2224.

See Statutes (34 & 35 H. 8. c. 20.)

Tenant in Tail—

Of the *Gift of the Crown*. 2224. v. *ut supra*.

Term—

On the *last* Day of it, a Motion to answer the Matters of an Affidavit cannot be made. 2502. See *Practice*.

Timber—

Carriages carrying *only One Piece*, are excepted out of the public *High-Way Acts*; but not out of the *Turnpike-Road Acts*. 2260. See *Statutes*.

Tithes—

The *Method of proceeding* for *Subtraction* of them, under 27 H. 8. c. 20. § 1. 32 H. 8. c. 7. § 4. & 2 & 3 E. 6. c. 13. § 13. discussed both at Bar and Bench; particularly, whether the *Attachment* given by 27 H. 8. c. 20. § 1. can be applied for *before Sentence*; and what is the proper Form of the *Certificate and Request* of the *Ecclesiastical Judge*, and of the *Commitment* grounded upon it: But the only Point fully and absolutely determined, was, “that 27 H. “ 8. c. 20. stands *unrepealed*.” 2095 to 2100.

Trade and Trader. See *Bankrupt*.

Journey-men are not liable to the *Penalty* of 5 Eliz. c. 4. §. 31. 2450.

Masters are liable to it, if unqualified themselves, or if they employ *unqualified Persons*: But a *double Penalty* was not intended. *ibid.*

Trespass.

A merely accidental *involuntary Trespass* may be justified: A *voluntary One* cannot. 2093. 2094. For instance—

1st. *Sheep* were trespassing in the Defendant's Ground. He chased them out, with a little Dog. The Dog *pursued*

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pursued them into his next Neighbour's adjoining Ground ; though the Defendant called in his Dog, as soon as he had driven the Sheep off from his own Grounds. The Owner of the Sheep brought Trespass for chasing them. It will not lie. *ibid.*
2dly. But if Persons enter the Plaintiff's Close, adjoining to his Paddock, with *Guns and Dogs*, not keeping in the *Foot-path*; and their Dog pulls down and kills One of the Plaintiff's Deer ; and the Jury (considering this as an *intentional*, not a merely accidental Trespass,) finds for the Plaintiff ; the Court will not set aside their Verdict, even though the Judge who tried the Cause thought it a mere Accident. *ibid.*

In *Trespass for taking Goods*, the Declaration must specify the Particulars. 2456.

Trial—

In a *County-Palatine*—The *Warrant for a Tales* must come from the King's Attorney-General. 2173, 2174.

Trover

By *Affinees of a Bankrupt*—will lie, where the Sale was *fraudulent and void*. 2477 to 2482. See *Bankrupt*.
There can be no *set-off*, in Trover. *ibid.*
An Action of Trover must be founded in *Property*. 2481.

Turnpikes.

Timber-Carriages (or *Stone-Carriages*) laden with *only One Piece*, are not excepted out of the Turnpike Acts. 2260.
See *Statutes*.

Variante

Between *Declaration* and *Proces*s.

1st. An *Executor*, suing out *Proces* as *Executor*, may declare in his *own Right*. 2417, 2418. But
2dly. If a Plaintiff takes out *Proces* to answer to him, *qui tam pro Rege quam pro seipso sequitur*, He can't declare in his *own Name only*. *ibid.*

Venue.

An *Attorney* has no Privilege to have the *Venue* changed into *MIDDLESEX*, where he is *DEFENDANT* : Though he has a *Priva-*

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a Privilege, when PLAINTIFF, to lay it and keep it in Middlesex; unless he sues in *auter Droit*, or jointly with another Person. 2027 to 2032.

Barristers or Officers of the Court, have the like Privilege, *ibid.* In transitory Actions, the Plaintiff has a Right to lay the *Venue where he pleases.* 2447.

And such a Right remains in him, where it appears that the County wherein the Cause of Action *really arose* is an improper one to try the Cause in. *ibid.*

" Whether the *Venue* may be changed into WALES," remained long undetermined; and is not solemnly determined yet: But it rather seems " that it may." 2450 to 2452.

Can't be changed (without Consent) to a County where the Cause of Action did not arise: For, the Affidavit must be express " that the Cause of Action arose in the County to which the Defendant prays to change the *Venue*; and not elsewhere, out of the said County." *ibid.*

Verdict.

Excessive Damages—250*l.* were not esteemed so, against a Sheriff of London, in an Action brought against him by a Poulterer, for a malicious Prosecution by two Indictments for Nuisances. 1974.

A Verdict for the Defendant shall not be set aside, in a criminal Prosecution, or where a criminal Prosecution might follow from it. 2257.

Victualler

Is not (*quatenus* Victualler) within the Bankrupt-Laws. 2064 to 2069.

Usury.

The Borrower of the Money was holden to be a competent Witness, to prove both the usurious Contract, and the Repayment of the Money. 2251 to 2256. See Witness.

Wales.

A Certiorari lies to a Welch Quarter-Sessions, to remove an Indictment up into the King's Bench, *per Saltum*; i. e. passing over the Grand Sessions. 2458, 2459. See Certiorari.

Will.—

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Will—

Attesting Witnesses ought not to be admitted to *deny their own Attestation.* 2225.

A “*Lis pendens* concerning the Validity of a Will” is a *sufficient Return to a Mandamus* commanding the Ecclesiastical Judge to grant *Probate* of it. 2295.

Not revoked by a subsequent Will afterwards *cancelled* by the Testator. 2514. See *Revocation*.

Window-Tax. See Orders, Hospitals.

Witnesses.

They ought not to be admitted to *deny their own Attestation.* 2225.

An *Objection to Competency* comes (in Strictness) *too late*: after a Witness has been sworn in Chief, examined, and cross examined. 2252.

Competency—Credibility—

1st. The Distinction between them is, “ That INTER-
“ EST goes to the *Competency*: INFLUENCE, to the
“ Credit only.” 2254, 2255.

2dly. Where the Matter is *doubtful*, the Objection should go to the Credit. 2255.

3dly. On a *qui tam Action* on the Statute of *Usury*, the Borrower of the Money was holden *competent* to prove both the *usurious Contract*, and also “ that the Money “ was repaid.” Note: There was no Bond or Assurance or Contract; the Pledge itself being the Value of the Debt. 2251 to 2256.



F I N I S.

